17-163

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~316.~~ 571

JAMES D. RUSSELL AND MARGARET C. GAVITT, APPELLANTS,

vs.

THOMAS ALLEN ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 11, 1879.

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1 THE UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States for the eastern district of Missouri.

JAMES D. RUSSELL ET AL., COMPLAINANTS,
vs.
THOMAS ALLEN ET AL., DEFENDANTS.

Be it remembered, that heretofore, on the 16th day of April, 1878, the following proceeding' were had in said case, to wit.

Bill filed.

JAMES D. RUSSELL ET AL., COMPLAINANTS,
vs.
THOMAS ALLEN ET AL., DEFENDANTS.

This day come the complainants, by their solicitors, Messrs. Dummer and Brown, and file their bill of complaint herein, and on motion of said solicitors it is ordered that subpœnas in chancery issue against said defendants, returnable to rules the first Monday (the 3rd day) of June next.

The said bill of complaint so filed is in words and figures following, to wit.

Bill of complaint.

Circuit court of the United States for the eastern district of Missouri, of the March term, A. D. 1878, of said court.

JAMES D. RUSSELL AND MARGARET C. GAVITT, complainants,
vs.
THOMAS ALLEN, JANE G. RUSSELL, SARAH E. Powell, Cornelia T. Fulkerson, Joseph Neill, William Neill, Thomas G. Houston, Margaret E. Martin, Russella A. Bates, Mary L. Patterson, John G. Russell, Charles S. Russell, Julia A. B. Russell, Russella Parker,
2 Martha J. Russell, Julia E. Russell, James Russell, Julia A. Morrison, Virginia S. Peuznet, William R. Moyer, Joseph C. Moyer, John Moyer, Mary Breckinridge, Margaret Highly, Harrison Sweeny, A. R. Sweeney, Eliza A. Jamison, Martha J. Roberts, Angeline R. Moyer, William P. Sloan, Sarah A. Sloan, Lewellyn M. Russell, Jefferson C. Russell, and John H. Russell, defendants.

Bill to establish a trust in Thomas Allen, in favor of the heirs of William Russell, deceased, and for an account.

To the hon. the judges of the circuit court of the United States for the eastern district of Missouri, in chancery setting:

Your orator, James D. Russell, and your oratrix, Margaret C. Gavitt,

respectfully show unto the court that at the date of the commencement of this suit your orator, James D. Russell, is a citizen of the State of Nebraska, and your oratrix, Margaret C. Gavitt, is a citizen of the State of Arkansas; that defendants Thomas Allen, Thomas G. Houston, John G. Russell, Charles S. Russell, Julia A. B. Russell, Russella Parker, Julia A. Morrison, Martha J. Russell, Julia S. Russell, James Russell, William R. Moyer, Joseph C. Moyer, John Moyer, Mary Breckenridge, Margaret Highly, Harrison Sweeney, A. R. Sweeney (whose christian name is unknown to complainants), Eliza A. Jamison, Martha J. Roberts, Margaret J. Sloan, Lewellyn M. Russell, Jefferson C. Russell, John H. Russell, and Angeline R. Moyer are citizens of the State of Missouri; that defendants Margaret E. Martin and Russella A. Bales are citizens of the State of Virginia; that defendant Mary L. Patterson is a citizen of the State of Pennsylvania; that defendants Joseph
3 Neill and William Neill are citizens of the State of Tennessee; that defendants Jane S. Russell, Sarah E. Powell, and Cornelia T. Fulkerson are citizens of the State of Illinois; and defendant Virginia S. Puegnet is a citizen of France and resident there.

Your complainants further show unto the court that on the day of , A. D. 1856, William Russell, who was never married, died at St. Louis, Missouri, the place of his residence, intestate, leaving surviving him the following-named heirs at law:

1. Your complainants, the children and only heirs of Moses Russell, a deceased brother of the said William Russell.

2. Jane G. Russell, the widow, and Sarah E. Powell and Cornelia T. Fulkerson, children of Joseph Russell, a deceased brother of the said William Russell, and Joseph Neill and William Neill, children of Frances Neill, a deceased daughter of the said Joseph Russell.

3. Thomas G. Houston, Margaret E. Martin, Russella A. Bales, and Mary L. Patterson, the children of Polly Russell Houston, a deceased sister of the said William Russell.

4. John G. Russell, Charles S. Russell, Julia A. B. Russell, Russella Parker, children of James Russell, a deceased brother of the said William Russell; Martha J. Russell, Julia E. Russell, and James Russell, children of John W. Russell, a deceased son of the said James Russell; Julia A. Morrison, child of Martha J. Sarpy, a deceased daughter of the said James Russell; and Virginia S. Pengnet, devisee and legatee of John R. Sarpy, a deceased son of the said Martha J. Sarpy.

5. William R. Moyer, Joseph C. Moyer, John Moyer, Mary Breckenridge, Margaret Highly, A. R. Sweeney, Harrison Sweeny, Eliza
4 A. Jamison, Martha J. Roberts, Angeline R. Moyer, children of Betsey Russell Moyer, a deceased sister of the said William Russell.

6. Lewellyn M. Russell, child of Benjamin Russell, a deceased brother of the said William Russell, and William R. Sloan and Sarah A. Sloan, children of Margaret J. Sloan, a deceased daughter of the said Benjamin Russell.

7. Jefferson C. Russell and John H. Russell, children of Alexander Russell, a deceased brother of the said William Russell.

Your complainants further show unto the court that on the nineteenth day of July, A. D. 1855, the said William Russell, as the owner in fee of the lands and lots hereinafter described, by four separate deeds of the said date of the 19th July, A. D. 1855, conveyed to one John S. Horner, in trust, said lands and lots, to wit: Lots numbered 50, 53, 81, 124, 125, 278, 279, 280, 291, 292, 293, 294, 295, 296, 297, 323, 329, 330, 331, 332, 335, 336, 401, 402, 479, & 480 of the town of Helena,

Phillips County, Arkansas, as the same are represented on the recorded plat of said town; the S. E. $\frac{1}{4}$ of section 11, township 1 south, range 4 east, containing 160 acres of land, originally owned by Mathew Longshore; the W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 20, township 1 south, range 5 east, containing 80 acres; the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of same section, township, and range, containing 80 acres; the N. W. fractional $\frac{1}{4}$ of section 19, township 2 south, range 5 east, containing $18\frac{35}{100}$ acres. Also, all right, title and interest of said Russell in and to the following tracts of land in said county of Phillips, (intending to convey the same by quit-
5 claim only), to wit: United States survey numbered 2384, township one south, range five east, containing 400 acres, more or less, originally owned by Sylvanus Phillips; the S. W. $\frac{1}{4}$ of section 25, township 1 south, range 2 east, containing 160 acres, originally owned by Joseph Legan or Logan; the S. E. fractional $\frac{1}{4}$ of section 19, township 1 north, range 5 east, containing $77\frac{70}{100}$ acres, originally owned by Millender Hanks; the W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 18, township 3 south, range 4 east, containing together 240 acres, originally owned by G. W. Ferrebee; the S. W. fr. $\frac{1}{4}$ of section 6, township 3 south, range 4 east, containing 157 acres, originally owned by G. W. Ferebee; the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 19, township 3 south, range 4 east, containing $42\frac{74}{100}$ acres, originally owned by G. W. Ferebee; the undivided half part of the N. E. fr. $\frac{1}{4}$, containing 99 acres; of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, containing 80 acres; of the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, containing 80 acres, and of the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, containing 40 acres, and of the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, containing 40 acres, all of section 10, township 1 north, range four east; the undivided half part of the S. W. $\frac{1}{4}$ of fractional section 11, township 1 north, range 4 east, containing $52\frac{06}{100}$ acres; the undivided half part of the N. W. fr. $\frac{1}{4}$ of section 13, containing $48\frac{08}{}$ acres, and of the N. E. fr. $\frac{1}{4}$ of same section, containing $39\frac{34}{100}$ acres, township 1 north, range 4 east; the undivided half part of the N. E. fr. $\frac{1}{4}$ of section 14, containing $80\frac{02}{}$ acres, township 1 north, range 4 east; the undivided half part of the S. E., N. E., and N. W. quarters of the S. W. fr. $\frac{1}{4}$ of section 18, containing $79\frac{16}{100}$, township 1 north, range 5 east; the S. E. fr. $\frac{1}{4}$ of section 14, township 2 south, range 4 east, containing $79\frac{20}{100}$ acres, originally owned by M. Hanks; the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 4, and the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 8, township 5 south, range 3 east, containing together 160 acres
6 of land. And also all other lands, lots, tenements, hereditaments and claims to lands, equities of redemption, reversions, and remainders of the said William Russell in the said county of Phillips, in the said State of Arkansas.

The following-described lands and lots situated in the county of Pulaski and State of Arkansas, to wit: Block marked "A" upon a plat of a partition made by commissioners under a decree of the circuit court of Pulaski County, of the north fractional half of section one, south of the Arkansas River, township one north, range twelve west, containing nine $\frac{23}{100}$ acres of land; block marked "C" of the same subdivision of said fractional half of section one, containing six $\frac{72}{100}$ acres of land; block marked "D" of the subdivision, containing five $\frac{56}{100}$ acres of land; also the following blocks and lots in Russell's addition to the city of Little Rock, as represented upon the recorded plat thereof, and laid off upon the northeast fractional quarter of section two, south of Arkansas River, in township one north, range 12 west, to wit: All of block numbered one, including lots one, two, three, four, five, six, seven and eight; all of block numbered two, including lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve; all of

respectfully show unto the court that at the date of the commencement of this suit your orator, James D. Russell, is a citizen of the State of Nebraska, and your oratrix, Margaret C. Gavitt, is a citizen of the State of Arkansas; that defendants Thomas Allen, Thomas G. Houston, John G. Russell, Charles S. Russell, Julia A. B. Russell, Russella Parker, Julia A. Morrison, Martha J. Russell, Julia S. Russell, James Russell, William R. Moyer, Joseph C. Moyer, John Moyer, Mary Breckenridge, Margaret Highly, Harrison Sweeney, A. R. Sweeney (whose christian name is unknown to complainants), Eliza A. Jamison, Martha J. Roberts, Margaret J. Sloan, Lewellyn M. Russell, Jefferson C. Russell, John H. Russell, and Angeline R. Moyer are citizens of the State of Missouri; that defendants Margaret E. Martin and Russella A. Bales are citizens of the State of Virginia; that defendant Mary L. Patterson is a citizen of the State of Pennsylvania; that defendants Joseph
3 Neill and William Neill are citizens of the State of Tennessee; that defendants Jane S. Russell, Sarah E. Powell, and Cornelia T. Fulkerson are citizens of the State of Illinois; and defendant Virginia S. Puegnet is a citizen of France and resident there.

Your complainants further show unto the court that on the day of , A. D. 1856, William Russell, who was never married, died at St. Louis, Missouri, the place of his residence, intestate, leaving surviving him the following-named heirs at law:

1. Your complainants, the children and only heirs of Moses Russell, a deceased brother of the said William Russell.

2. Jane G. Russell, the widow, and Sarah E. Powell and Cornelia T. Fulkerson, children of Joseph Russell, a deceased brother of the said William Russell, and Joseph Neill and William Neill, children of Frances Neill, a deceased daughter of the said Joseph Russell.

3. Thomas G. Houston, Margaret E. Martin, Russella A. Bales, and Mary L. Patterson, the children of Polly Russell Houston, a deceased sister of the said William Russell.

4. John G. Russell, Charles S. Russell, Julia A. B. Russell, Russella Parker, children of James Russell, a deceased brother of the said William Russell; Martha J. Russell, Julia E. Russell, and James Russell, children of John W. Russell, a deceased son of the said James Russell; Julia A. Morrison, child of Martha J. Sarpy, a deceased daughter of the said James Russell; and Virginia S. Pengnet, devisee and legatee of John R. Sarpy, a deceased son of the said Martha J. Sarpy.

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7. Jefferson C. Russell and John H. Russell, children of Alexander Russell, a deceased brother of the said William Russell.

Your complainants further show unto the court that on the nineteenth day of July, A. D. 1855, the said William Russell, as the owner in fee of the lands and lots hereinafter described, by four separate deeds of the said date of the 19th July, A. D. 1855, conveyed to one John S. Horner, in trust, said lands and lots, to wit: Lots numbered 50, 53, 81, 124, 125, 278, 279, 280, 291, 292, 293, 294, 295, 296, 297, 323, 329, 330, 331, 332, 335, 336, 401, 402, 479, & 480 of the town of Helena,

Phillips County, Arkansas, as the same are represented on the recorded plat of said town; the S. E. $\frac{1}{4}$ of section 11, township 1 south, range 4 east, containing 160 acres of land, originally owned by Mathew Longshore; the W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 20, township 1 south, range 5 east, containing 80 acres; the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of same section, township, and range, containing 80 acres; the N. W. fractional $\frac{1}{4}$ of section 19, township 2 south, range 5 east, containing $18\frac{35}{100}$ acres. Also, all right, title and interest of said Russell in and to the following tracts of land in said county of Phillips, (intending to convey the same by quit-
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6 of land. And also all other lands, lots, tenements, hereditaments and claims to lands, equities of redemption, reversions, and remainders of the said William Russell in the said county of Phillips, in the said State of Arkansas.

The following-described lands and lots situated in the county of Pulaski and State of Arkansas, to wit: Block marked "A" upon a plat of a partition made by commissioners under a decree of the circuit court of Pulaski County, of the north fractional half of section one, south of the Arkansas River, township one north, range twelve west, containing nine $\frac{23}{100}$ acres of land; block marked "C" of the same subdivision of said fractional half of section one, containing six $\frac{72}{100}$ acres of land; block marked "D" of the subdivision, containing five $\frac{56}{100}$ acres of land; also the following blocks and lots in Russell's addition to the city of Little Rock, as represented upon the recorded plat thereof, and laid off upon the northeast fractional quarter of section two, south of Arkansas River, in township one north, range 12 west, to wit: All of block numbered one, including lots one, two, three, four, five, six, seven and eight; all of block numbered two, including lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve; all of

block numbered four, including lots one, two, three, four, five, six, seven, and eight; all of block numbered eight, including lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, and fifteen; all of block numbered ten, including lots one, two, three, four, five, six, seven, and eight; the upper half of block numbered eleven, including lots one, two, three, four, five, six, and seven; all of block fifteen, including lots one, two, three, four, five, six, seven, and eight; all of blocks numbered seventeen and nineteen, containing together nearly six acres of land; all of block numbered twenty,
7 containing one $\frac{870}{1000}$ acres of land; also fractional lot numbered nine, in block four of Pope's addition to the city of Little Rock; and also all the right, title, and interest of the said William Russell in and to the following blocks and lots of land situated in the city of Little Rock, west of the Quapau line, to wit: Block numbered F, being a triangular-shaped lot, at the corner of Cherry and Rock streets, and between Rock street and the Quapau line; block numbered three hundred and forty-four, being three hundred feet [ ] and one hundred and forty feet wide, and lying between North street and Water street, and between Arch street and West Main street; the undivided half part of the west half of block numbered ninety-eight, fronting on Spring street, between Cherry and Rock streets; the undivided half part of lot numbered five, and of twenty feet of the west side of lot numbered four, in block ninety-nine, fronting on Water street; the undivided half part of fractional lots numbered ten, eleven, and twelve, in block numbered five, fronting on Scott street; the undivided half part of lots numbered seven, eight, and nine, in block numbered six; and also the north part of the southeast quarter of section twenty-seven (27), township two (2) north, of range twelve (12) west (divided from the south part by an east and west line), and containing one hundred acres, and originally patented to Charles Sinclair; and also all the other lands, lots, tenements, hereditaments, and claims to land, equities of redemption, reversions, and remainders of the said William Russell in the said county of Pulaski.

The following-described tracts of land lying and being in the county of Conway and State of Arkansas, to wit: The south and southeastwardly part of the west fractional half of section seven, town-
8 ship five north, range fourteen, west, containing about sixty-five acres of land; the west half of the southeast quarter of the same section seven, adjoining the above tract, containing eighty acres; the northwest fractional quarter of section eighteen, township five, north, range fourteen west, containing eighty-four $\frac{09}{100}$ acres, excepting nine and a half acres sold to the trustees of the Methodist Church; the above three tracts all adjoin each other; the southwest fractional quarter of section thirty-six, township five north, range fifteen west, containing ninety acres, and being a part of Dr. Opes' old farm.

The following-described tracts of land situated in the county of Independence and State of Arkansas, to wit: The east half of section eleven, township eleven north, range four west, containing three hundred and twenty acres, originally owned Reskitt and Jacob Sellers; the east fractional half of section twenty-two, and the southwest fractional quarter of section twenty-three, township thirteen north, range seven west, containing together one hundred and twenty-five acres, patented to said William Russell; the east fractional half of section twenty-three, township thirteen north, range seven west, containing eighty acres, patented to said Russell; the east half of the northeast quarter of section twenty-seven, township thirteen north, range seven west, contain-

ing eighty acres, patented to said Russell; and also all other lands, lots, tenements, hereditaments, and claims to land, equities of redemption, reversions, and remainders of the said William Russell in the said counties of Conway and Independence and in said State of Arkansas.

The following-described lands situate in the county of Monroe and State of Arkansas, to wit: The northwest quarter of section twenty-seven (27), township two south, range one west, containing one
9 hundred and sixty acres, and originally owne' by Moses Wright; the southeast quarter of section ten (10), township one north, range two west, containing one hundred and sixty acres, and originally owned by Robert Brown; the southeast fractional quarter of section fourteen (14), township one north, range three west, containing one hundred and seventeen $\frac{76}{100}$ acres, originally owned by George Ferebee; the northwest fractional quarter of section twenty-three (23), township one north, range three west, containing one hundred and sixty-seven $\frac{95}{100}$ acres, and originally owned by George Ferebee; the east half of the southeast quarter and the northwest quarter of the southeast quarter of section thirty-four (34), township one south, range two west, containing one hundred and twenty acres, and originally owned by William Hanks.

The following-described tract of land situate in the county of Desha, in said State of Arkansas, to wit: United States survey numbered 2425, in township eight south, range two west, containing five hundred and ten acres of land, originally owned by Peter Lefevre, jr.

And also the following-described two tracts of land situated in the county of Arkansas, in the said State of Arkansas, to wit: United States survey numbered 2430, in township seven south, range three west, containing five hundred and fifty acres of land, originally owned by Joseph Frudeau; United States survey numbered 2365, in township seven and eight south, range two and three west, containing five hundred and fifty acres of land, originally owned by Mary Derresson; and also all other lands, lots, tenements, hereditaments, and claims to land, equities of redemption, reversions, and remainders of the said William Russell in the said counties of Monroe, Desha, and Arkansas,
10 and in any other county of the said State of Arkansas.

And the said William Russell, by the same deeds above mentioned, also transferred and delivered to the said John S. Hornor, in trust, divers choses in action, evidencing an indebtedness to said William Russell from residents of the State of Arkansas, of the description and amount of which indebtedness, your complainants are not informed.

Your complainants further show unto the court that the uses and trusts upon which said conveyances of real estate and transfers of choses in action were made are set forth and declared in said four deeds executed by the said William Russell on the 19th day of July, A. D. 1855, which deeds contain, as far as your complainants are advised, the only evidence of the scope and character of said trusts, and are, except in the matter of descriptions of land, alike in substance, and almost identical in language, and said declarations of trust are in words following, to wit:

"This deed made, &c., witnesseth that the said William Russell, for divers other good and valuable considerations, but chiefly for the purpose of founding an institution for the education of youth in St. Louis County, Missouri, hath granted, &c., to have and to hold the said property and premises unto him, the said party of the second part, his executors and successors, in trust forever; in trust, however, and to

and for the following uses and purposes, to wit, the said property is conveyed for the use and benefit of the Russell Institute of St. Louis, Missouri. And the said party of the second part, &c., shall account for and pay over the money or proceeds of all sales and collections, in cash, as often as once in each year, or oftener if convenient, to Thomas Allen, president of the board of trustees of the said Russell In-
11 stitute, at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said party of the second part, &c.

"And whereas the said party of the first part hath, by several deeds bearing even date herewith, conveyed to the said party of the second part (John S. Hornor) all his property in the counties of Phillips, Desha, Monroe, Arkansas, and Pulaski, in the said State of Arkansas, in like manner, and for the like uses and purposes as herein: Now it is hereby declared that all of said conveyances, including this, are made to one and the same person for one and the same use and purpose, and that the same are and are, to be deemed and taken and accounted for, as one trust, according to the conditions of the deeds respectively, it having been intended by said deeds and this present one to convey all the remaining property of the said William Russell in the said State of Arkansas to the said party of the second part to and for the use and benefit of the said Russell Institute of St. Louis, Missouri."

Your complainants, in explanation of the above statement that said four deeds are, except as to the description of the real estate conveyed, alike in substance and almost identical in language, further show unto the court that in one of said deeds, to the declaration of trust last above quoted, are added, after the words "Russell Institute of St. Louis, Missouri," the following words, "represented by their president as aforesaid," all of which will more fully appear by said four deeds, copies of which are filed with and made part of this bill of complaint, marked Exhibits 1, 2, 3, & 4.

And your complainants further show unto the court that at the date of the execution of said deeds (Exhibits 1, 2, 3, & 4), viz, July 19th, 1855, there was not, nor has there ever been, before or since the execution of the said deeds, up to the date of the filing of this bill, any
12 corporation or educational institution at St. Louis County, Missouri, known as the "Russell Institute," nor has there been in existence at any time, up to the date of the filing of this bill of complaint, any educational institution at St. Louis County, Missouri, or elsewhere, by whatever name, to which said William Russell could have referred in said declaration of trust; and your complainants aver that the alleged "board of trustees of the Russell Institute," and the alleged "presidency" of such board of trustees, are fictions.

Your complainants further show unto the court that at the date of the execution of said deeds (Exhibits 1, 2, 3, & 4) the said William Russell was from paralysis quite infirm in body (as evidenced by the explanation given in said deeds why they were signed with a mark), and was also weak in mind, and while Mr. William Russell manifestly purposed to found an educational institution, to be known as the "Russell Institute," at the time of executing said deeds, yet in his increasing infirmity of both body and mind during the short period that intervened between the date of said deeds and the date of his death he failed to accomplish his philanthropic purpose.

Your complainants further show unto the court that no authority was delegated by Mr. William Russell to Mr. John S. Hornor, nor to Mr. Thomas Allen, nor to any other person or corporation to organize a Russell Institute, and your complainants further aver that no such

authority has hitherto been exercised or claimed by any person or corporation, and therefore there was not at the date of the execution of said deeds, nor is there now, nor has there ever been any donee capable of receiving and holding and administering the trust fund created by said four deeds of the date of the 19th of July, A. D. 1855.

13 And your complainants further show unto the court that the beneficiaries of the said trust, so far as can be determined by the terms of said four deeds (Exhibits 1, 2, 3, & 4), are uncertain and indefinite, and there not being a donee capable of receiving and holding and administering said trust, and the beneficiaries being uncertain, the trust created by said deeds is invalid, and said trust-fund rightfully belongs to your complainants and the other heirs at law of the said William Russell, defendants, in such proportions as are determined by the laws of Missouri in the case of intestate estates.

Your complainants further show unto the court that the said John S. Hornor executed to a large extent the trust created by said four deeds by selling the lands therein conveyed (excepting lands conveyed to defendant Allen, hereinafter mentioned), and collecting the proceeds of sale, and by collecting the choses in action transferred to him by William Russell as aforesaid, and after deducting herefrom taxes and expense account, and commissions, paid of said proceeds of sales and collections to the defendant Thomas Allen, in money, the sum of forty-eight thousand and forty-eight dollars and forty-five cents, from time to time, as shown in the following itemized statement:

Amount of moneys paid Thomas Allen by John S. Hornor, as trustee of Russell fund:

1855.	Nov		200
1856.	March	1,000	
	April	350	
	May	1,100	
	Dec	500	
			2,950
14 1857.	Jan'y	500	
	Feb'y	1,000	
	April	500	
	July	500	
	Octo	500	
			3,000
1858.	May	2,500	
	June	1,600	
	Dec	200	
			4,300
1859.	March	1,200	
	April	2,200	
	May	1,000	
	June	200	
	July	1,500	
			6,100
1860.	Feb'y	1,000	
	April	1,500	
	June	1,000	
			3,500
1861.	Feb'y		200
1866.	Dec		1,127 50

1867.	Feb'y	518	
	June	500	
			1,018
1868.	June	1,800	
	Do	200	
	July	500	
			2,500
1869.	Jan'y	6,249 20	
	Do	1,000	
	March	1,000	
	April	3,000	
	May	2,000	
			13,249 20
1870.	Jan'y	2,000	
	May	1,500	
	June	1,500	
			5,000
15	1872. Feb'y	1,503 75	
	April	1,000	
			2,503 75
1874.	Feb'y		1,400
1875.	Jan'y		1,000
			$48,048 45

Your complainants further show unto the court that on the 16th day of February, A. D. 1874, the said John S. Hornor conveyed to said defendant Allen the following-described land, part of said trust-fund, to wit, the southeast quarter of section eleven (11), in township one (1) south of the base line and in range four (4) east of the 5th principal meridian, containing according to the public surveys one hundred and sixty acres, situate in the county of Phillips and State of Arkansas, as will more fully appear by the original deed, a copy of which is herewith filed and made part of this bill of complaint, marked Exhibit 5.

And your complainants charge that lands which were part of the said trust-fund, created by said deeds of the date of the 19th of July, A. D. 1855, other than the land conveyed by Exhibit 5, were conveyed to the said defendant Allen by said trustee John S. Hornor, and that uncollected personal assets, part of said trust-fund, were transferred by said Hornor to defendant Allen, the amount and description of which are not known to your complainants, and that all of said lands and personal assets conveyed by said William Russell to John S. Hornor, as aforesaid, or their proceeds, have passed to defendant Allen.

Your complainants further show unto the court that defendant
16 Allen has hitherto held and controlled and now holds and controls all of said fund; that said Allen has never applied to any court for aid in the disposition and application of the same as a trust-fund, and that practically said Allen has in no way used or recognized said fund as one held by him in trust for the uses declared by said William Russell.

And your complainants charge that said defendant Allen has used said money and lands, and other assets paid and transferred to him by said Hornor, for his own personal profit and advantage, and that large accumulations have arisen from the use of the said trust-fund which are still in his possession and under his control, or have been expended for his own personal uses, or in some way not authorized by the donor, William Russell.

Your complainants aver that they, as two of the heirs at law of William Russel, have made a formal demand upon defendant Thomas Allen to render an account of the trust-fund placed in his hands as aforesaid, with its accumulations, and that he pay over to them, as heirs of said William Russell, such proportional part of said trust-fund, including accumulations, as they are entitled to under the laws of the State of Missouri regulating descents and distributive shares in the case of an intestate's estate; but the said Thomas Allen refuses and neglects to account to complainants for said trust-fund and refuses to pay over to them any part of the same.

Your complainants further show unto the court that there is no lien on the said money and estate in the hands and under the control of the said Thomas Allen in favor of creditors of the said William
17 Russell, all the pecuniary liabilities against his estate having long since been liquidated.

And to enable your orator to have a more perfect discovery of the amount and present condition of said trust-fund and its use and accumulations while the same has been in the possession and under the control of the defendant Thomas Allen, the following interrogatories are propounded to him:

1. Were the sums of money alleged to have been paid you by John S. Hornor as above stated actually paid to you, and at or about the datess pecified? Have you kept any account of such payments? If so, please furnish with your answer a copy of such account.

2. If money has been paid to you on account of said trust-fund, has it been invested, and, if so, when and how? If not invested, in what bank or other place of deposit has it been kept? If invested or loaned, on what securities, or to whom loaned? What income has it yielded, and what has been done with such income? If there have been any accumulations, how have such accumulations or such interest or income been invested or used?

3. Has any of the money referred to been used by you in your private business, and, if so, to what extent?

4. If any land, part of the original trust fund, has been conveyed to you by John S. Hornor, give a description of the same, and upon what conditions, and for what considerations were such conveyances made to you, giving with your answer a copy of the deed or deeds of conveyance; and, if such conveyances have been made to you, do you still hold the legal title to the land conveyed? If not, when were
18 such lands or any of them sold and conveyed, and to whom and for what consideration?

5. Were any notes, bills, or other evidences of indebtedness, or any valuable thing part of the said original trust-fund, transferred to you by said John S. Hornor? If so, give a list or description of the same, and what amount, if anything, has been collected on the same, and when; and if any account has been kept by you of the same, furnish with your answer a copy of such account.

6. What, at the date of the filing of this bill, is the condition and amount of the money paid to you on account of said trust-fund by J. S. Hornor, including accumulations?

In consideration of which premises, and because your complainants are remediless except in a court of equity, they pray that process of summons may issue against the said Thomas Allen, Jane G. Russell, Sarah E. Powell, Cornelia T. Fulkerson, Joseph Neill, William Neill, Thomas G. Houston, Margaret E. Martin, Russella A. Bales, Mary L. Patterson, John G. Russell, Charles S. Russell, Julia A. B. Russell,

Russella Parker, Martha J. Russell, Julia E. Russell, James Russell, Julia A. Morrison, Julia A. Peugnet, William R. Moyer, Joseph C. Moyer, John Moyer, Mary Breckenridge, Margaret Highly, Harrison Sweeney, A. R. Sweeney, Eliza A. Jamison, Martha J. Roberts, Angeline R. Moyer, William P. Sloan, Sarah A. Sloan, Lewellyn M. Russell, Jefferson C. Russell, and John H. Russell, and that they be required to answer touching all and singular the allegations of this bill of complaint, yet not upon oath, answers upon oath being hereby waived; that an interlocutory order be made directing that an account be
19 taken of the money and estate in the hands of the said Thomas Allen, paid and transferred to him by said John S. Hornor, and an account of the accumulations growing out of the use of said money and estate, by loan or investment, or by the use of said money and estate by the said Thomas Allen in his own business and for his own personal profit and advantage, and that upon a final hearing the court will decree that the trust attempted to be created for the founding of an educational institution to be known as the "Russell Institute" is invalid; that the moneys found to be in the hands of the said Thomas Allen, from the proceeds of the sales of land and lots and collections by said John S. Hornor, and the land conveyed to the said Allen by J. S. Hornor as aforesaid, be held, with all accumulations, as moneys and estate belonging to the heirs at law of the said William Russell, together with interest at such rate and on such modes of computation as upon equitable principles are chargeable against a trustee using the trust-fund for his purposes; that the said Thomas Allen be required to pay to your complainants such proportionate share of the said money and estate as belongs to them as their distributable share as heirs of William Russell, under the laws of the State of Missouri, and that the court will render such other and further relief as to equity may pertain and the interests of your complainants may require; and your complainants will ever pray, &c.

JAMES D. RUSSELL.
MARGARET C. GAVITT.

HENRY E. DUMMER,
WILLIAM BROWN,
Solicitors for Complainants.

The following exhibits were filed with said bill, to wit:

20 EXHIBIT 1.

William Russell to John S. Horner.—Deed of trust.

This deed, made and entered into the nineteenth day of July, A. D. eighteen hundred and fifty-five, by and between William Russell, of the city of St. Louis and State of Missouri, party of the first part, and John S. Hornor, of the town of Helena, Phillips County and State of Arkansas, party of the second part, witnesseth: That the said party of the first part, for and in consideration of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and for divers other good and valuable considerations, but chiefly for the purpose of founding an institution for the education of youth in St. Louis County, Missouri, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said party of the second part, his executors, administrators, or successors in trust forever, all and singular the following de-

scribed tracts of land, lying and being in the county of Conway and State of Arkansas, to wit: The south and southeastwardly part of the west fractional half of section seven, township five north, range fourteen west, containing about sixty-five acres of land; the west half of the southeast quarter of the same section seven, adjoining the above tract, containing eighty acres; the northwest fractional quarter of section eighteen, township five north, range fourteen west, containing eighty-four $\frac{09}{100}$ acres, excepting nine and a half acres sold to the trustees of the Methodist church; the above three tracts all adjoin
21 each other; the southwest fractional quarter of section thirty-six (36), township five north, range fifteen west, containing ninety acres, and being a part of Dr. Opes' old farm. And also the following-described tracts of land situated in the county of Independence and State of Arkansas, to wit: The east half of section eleven, township eleven north, range four west, containing three hundred and twenty acres, originally owned Peskitt and Jacob Sellers; the east fractional half of section twenty-two and the southwest fractional quarter of section twenty-three, township thirteen north, range seven west, containing together one hundred and twenty-five acres, and patented to said William Russell; the east fractional half of section twenty-three, township thirteen north, range seven west, containing eighty acres, patented to said Russell; the east half of the northeast quarter of section twenty-seven west, containing eighty acres, patented to said Russell; and also all other lands, lots, tenements, hereditaments, and claims to land, equities of redemptions, reversions, and remainders of him, the said party of the first part, in the said counties of Conway and Independence, and in said State of Arkansas; and also all moneys, credits, accounts, notes, bonds, and mortgages, rents, and all other property due or owing, belonging or coming, to the said party of the first part in the said State of Arkansas; to have and to hold the said property and premises unto him, the said party of the second part, his executors and successors, in trust forever; in trust, however, and to for the following uses and purposes, to wit, the said property is conveyed for the use and benefit of the "Russell Institute" of St. Louis, Missouri.

And the said party of the second part, his executors, adminis-
22 trators and successors in trust, is hereby empowered and directed absolutely to sell and convey the said real estate hereinbefore described and referred to, and any part thereof, and any right the said party of the first part may have to any real estate in the said counties of Conway and Independence, or in the said State of Arkansas, as soon as conveniently may be, at such prices and on such terms as he may judge fair, reasonable, and safe, and to collect and receive the money therefor, and to convey the same by deed to the purchaser or purchasers thereof, and to take security for any part of the purchase-money, and when paid to give proper acquittances and discharges therefor, and also to collect and get in the said personal property, if any, and whatever may be due, owing or coming to the said party of the first part, in the said State of Arkansas, and to account for and pay over the money or proceeds of all sales and collections, in cash, as often as once in each year, or oftener if convenient, to Thomas Allen, president of the board of trustees of the said Russell Institute, at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said party of the second part for the amount so paid and the application thereof, deducting therefrom the reasonable expenses incident to the execution of this trust actually incurred in this behalf by the said

party of the second part, and all legal taxes assessed and paid on said property until sold, and a commission of five per cent. to the said party of the second part, for his own services and trouble, on all money actually collected and paid over by him by virtue hereof. This trust shall be brought to a close, and all the profits and proceeds of the property herein included, subject to the deductions aforesaid, paid
23 over as herein required, as soon as conveniently may be, and if the same is not concluded in ten years from this date, the said trustee, his executors, administrators, or successors in trust, shall expose any and all real property remaining undisposed of at the end of that time to sale, by public auction, for cash, after reasonable notice and advertisement, and sell the same, and pay over the proceeds as hereinbefore required, excepting any property which may be at that time involved in suit, and as to such property, if any, the trust shall be closed as soon as practicable after the termination of such suit or suits. And whereas the said party of the first part hath, by several deeds bearing even date herewith, conveyed to the said party of the second part all his property in the counties of Phillips, Desha, Monroe, Arkansas, and Pulaski, in the said State of Arkansas, in like manner and for the like uses and purposes as herein: Now, it is hereby declared that all of said conveyances, including this, are made to one and the same person, for one and the same use and purpose, and that the same are, and are to be deemed and taken and accounted for, as one trust, according to the conditions of the deeds respectively, it having been intended by said deeds and this present one to convey all the remaining property of the said William Russell in the said State of Arkansas to the said party of the second part, to and for the use and benefit of the said Russell Institute of St. Louis, Missouri.

And the said party of the second part covenants faithfully to perform the trust hereby created.

In witness whereof the said parties have hereunto set their hands and seals the day and year above written, the said Russell mak-
24 ing his mark in consequence of paralysis of his right arm.

his
WILLIAM + RUSSELL. [SEAL.]
mark.
JOHN S. HORNOR. [SEAL.]

Executed in the presence of—
WM. J. HAMMOND,
EVELYN A. BURT.

STATE OF MISSOURI,
County of St. Louis:

Be it remembered that on this nineteenth day of July, eighteen hundred and fifty-five, before me, the undersigned, clerk of the circuit court within and for the county aforesaid, came William Russell, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and he acknowledged the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of St. Louis, the day and year last aforesaid.

[L. S.] WM. J. HAMMOND, *Clk.*

STATE OF ARKANSAS,
County of Phillips:

Be it remembered that on the seventeenth day of September, A. D. 1855, personally came and appeared before the undersigned, clerk of the circuit court in and for the county and State aforesaid, John S. Horner, one of the parties to the above and foregoing deed of trust or instrument of writing, to me personally well known, and acknowledged that he had signed, sealed, and executed the same for the uses and purposes and considerations therein mentioned and set forth, and desired the same so certified, which is accordingly hereby done.

In testimony whereof I have hereunto set my hand and affixed
25 the seal of the circuit court, at office, in Helena, this the day and year last above written.

[SEAL.] EDW. H. CONLEY, *Clk.*

STATE OF ARKANSAS,
County of Conway, ss:

I, Joshua Moses, clerk of the circuit court and ex-officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 20th day of February, A. D. 1856, and the same is now duly recorded in record-book F, pages 407, 408, 409, 410, & 411.

In testimony whereof I have hereunto set my hand and affixed the seal of my office this 21st day of Feb'y, A. D. 1856.

[SEAL.] JOSHUA MOSES,
Clerk & Ex-officio Recorder.

The foregoing instrument of writing was filed for record in my office on the 12th day of March, A. D. 1856.

STATE OF ARKANSAS,
County of Independence, s:

I, Ed. M. Dickinson, clerk of the circuit court and ex-officio recorder in and for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing is a true, correct, and complete copy of the deed of trust given by William Russell to John S. Horner, as the same appears now upon record in my office in record of deeds and mortgages, book K, pages 527, 528, 529, & 530.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, this 18th day of March, A. D. 1878.

[SEAL.] E. M. DICKINSON,
Clerk & Ex-officio Recorder,
By M. A. WYCOUGH, *D. C.*

26 EXHIBIT 2.

This deed, made and entered into the nineteenth day of July, A. D. eighteen hundred and fifty-five, by and between William Russell, of the city of St. Louis and State of Missouri, party of the first part, and John S. Horner, of the town of Helena, Phillips County and State of Arkansas, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and for divers other good and valuable considerations him hereto moving, and chiefly for the purpose of

founding an institution for the education of youth in St. Louis County, Missouri, hath granted, bargained, and sold and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said party of the second part, his executors and administrators or successors in trust forever, all and singular all the right, title, and interest and claim in and to the following-described lands situate in the county of Monroe and State of Arkansas, to wit:

The northwest quarter of section twenty-seven (27), township two south, range one west, containing one hundred and sixty acres, and originally owned by Moses Wright; the southeast quarter of section ten (10), township one north, range two west, containing one hundred and sixty acres, and originally owned by Robert Brown; the southwest fractional quarter of section fourteen, township one north, range three west, containing one hundred and seventeen & $\frac{76}{100}$ acres, and originally owned by George Ferebee; the northwest fractional quarter of section twenty-three (23), township one north, range three west, containing one hundred and sixty-seven $\frac{95}{100}$ acres, and originally
27 owned by George Ferebee; the east half of the southeast quarter and the northwest quarter of the southeast quarter of section thirty-four (34), township one south, range two west, containing one hundred and twenty acres, and originally owned by William Hanks.

And also the following-described tract of land situate in the county of Desha, in said State of Arkansas, to wit: United States survey numbered 2425, in township eight south, range two west, containing five hundred and ten acres of land, originally owned by Peter Lefevre, jr.

And also the following-described two tracts of land situate in the county of Arkansas, in the said State of Arkansas, to wit: United States survey numbered 2430, in township seven south, range three west, containing five hundred and fifty acres of land, and originally owned by Jacob Trudeau; United States survey numbered 2365, in township seven and eight south, range two and three west, containing five hundred and fifty acres of land, and originally owned by Mary Derresau.

And also all other lands, lots, tenements, hereditaments, and claims to land, equities of redemption, reversions, and remainders of him, the said party of the first part, in the said counties of Monroe, Desha, and Arkansas, and in any other county of the said State of Arkansas. And also all moneys, credits, accounts, notes, bonds and mortgages, rents, and all other property due, owing, or belonging or coming to the said party of the first part in the said State of Arkansas.

To have and to hold the said property and premises unto him the said party of the second part, his executors, administrators, and successors in trust forever. In trust, however, and to and for the following uses and purposes, to wit: The said property is conveyed for the use and benefit of the Russell Institute of St. Louis, Missouri,
28 and the said party of the second part, his executors, administrators, and successors in trust, is hereby empowered and directed absolutely to sell and convey the said real estate hereinbefore described and referred to, or any part thereof, and any right the said party of the first part may have to any real estate in the said counties of Monroe, Desha, and Arkansas, or in the said State of Arkansas, as soon as conveniently may be, at such prices and on such terms as he may judge fair and reasonable and safe, and to collect and receive the money therefor, and to convey the same by deed to the purchaser or purchasers thereof, and to take security for any part of the purchase-money, and when paid to give property acquittances and discharges therefor, and also to collect and get in the said personal property, if any, and whatever may be

due, owing, or coming, to the said party of the first part in the said State of Arkansas, and to account for and pay over the money or proceeds of all sales and collections, in cash, as often as once in each year, or oftener if convenient, to Thomas Allen, president of the board of trustees of the said Russell Institute, at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said party of the second part for the amount so paid and the application thereof, deducting therefrom the reasonable expenses incident to the execution of this trust, actually incurred in this behalf, by the said party of the second part, and all legal taxes assessed on said property until sold, and a commission of five per cent. to the said party of the second part for his own services and trouble on all moneys actually collected and paid over by virtue hereof. This trust shall be brought to a close, and all the profits and proceeds of the property herein included, subject to the deductions aforesaid, paid over as herein required as soon as conveniently may be, and if the same is not concluded in ten years from this date the said trustee, his executors, administrators,
29 or successors in trust, shall expose any and all real property remaining undisposed of at the end of that time to sale by public auction, for cash, after reasonable notice and advertisement, and sell the same, and pay over the proceeds as hereinbefore required, excepting any property which may be at that time involved in suit, and as to such property, if any, the trust shall be closed as soon as practicable after the termination of such suit or suits. And whereas the said party of the first part hath, by deeds bearing even date herewith, conveyed to the said party of the second part all his property in the counties of Phillips, Pulaski, Conway, and Independence, in the said State of Arkansas, in like manner and for the like purposes and uses as herein: Now, it is hereby declared that all of said conveyances, including this, are made to one and the same person, for one and the same use and purpose, and that the same are deemed and taken and accounted for as one trust, according to the conditions of the deeds respectively, it having been intended by said deeds and this present one to convey all the remaining property of the said William Russell in the said State of Arkansas to the said party of the second part, to and for the use and benefit of the said Russell Institute of St. Louis, Missouri. And the said party of the second part covenants faithfully to perform the trusts hereby created.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

his
WILLIAM × RUSSELL. [L. S.]
mark.
JOHN S. HORNER. [L. S.]

Executed in presence of (the said Russell making his mark in consequence of paralysis of the right arm)—

WM. J. HAMMOND,
EVELYN A. BURT.

30 STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on this the nineteenth day of July, eighteen hundred and fifty-five, before me, the undersigned, clerk of the circuit court within and for the county aforesaid, came William Russell, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and

he acknowledges the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of St. Louis, the day and year aforesaid.

[L. S.] WM. J. HAMMOND.

STATE OF ARKANSAS,
County of Arkansas:

I, B. F. Quertermous, clerk of the circuit court and ex-officio recorder in and for the county aforesaid, do hereby certify that the annexed and foregoing six pages contains a true, complete, and perfect transcript of a certain deed from Wm. Russell to Jno. S. Horner, trustee of Russell Institute, St. Louis, Mo., as the same now appears of record in my office in record of deeds "I," on pages 283, 284, 285, & 286.

In testimony whereof I have hereunto set my hand and affixed my official seal this 11th day of March, A. D. 1878.

[L. S.] B. F. QUERTERMOUS,
Clk and Ex-officio Recorder,
By J. J. McEVOY, *D. C.*

31 EXHIBIT No. 3.

This deed, made and entered into this 19th day of July, eighteen hundred and fifty-five, by and between William Russell, of the city of St. Louis and State of Missouri, party of the first part, and John S. Hornor, of the town of Helena, county of Phillips, and State of Arkansas, party of the second part, witnesseth: That the said party of the first part, for and in consideration of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and for divers other good and valuable considerations *herein* hereto moving, but chiefly for the purpose of founding an institution for the education of youth in St. Louis County, Missouri, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said party of the second part, his executors & administrators or successors, in trust, forever, all and singular the following-described lands and lots situated in the county of Pulaski and State of Arkansas, to wit: Block marked A upon a plat of a partition made by commissioner under a decree of the circuit court of Pulaski County of the north fractional half of section one, south of the Arkansas River, township one north, range twelve west, containing nine $\frac{23}{100}$ acres of land; block marked C of the same subdivision of said fractional half of section one, containing six $\frac{72}{100}$ acres of land; block marked D of the subdivision, containing five $\frac{56}{100}$ acres of land. Also the following blocks and lots in Russell's addition to the city of Little Rock, as represented upon the recorded plat thereof, and laid off upon the northeast fractional quarter of section two (2), south of Arkansas River, in township one north, range twelve west, to wit: All of block numbered one (1), including lots
32 one, two, three, four, five, six, seven, and eight; all of block numbered two (2), including lots numbered one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve; all of block numbered four (4), including lots one, two, three, four, five, six, seven, and eight; all of block numbered eight (8), including lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, and fifteen; all of block numbered ten (10), including lots

numbered one, two, three, four, five, six, seven, and eight; the upper half of block numbered eleven (11), including lots one, two, three, four, five, six, and seven; all of block fifteen, including lots numbered one, two, three, four, five, six, seven, and eight; all of block numbered seventeen (17) and nineteen (19), containing together nearly six acres of land; and all of block numbered twenty (20), containing one $\frac{870}{1000}$ acres of land; and also fractional lot numbered nine (9), in block numbered four (4) of Pope's addition to the city of Little Rock. And also all the right, title, and interest of the said party of the first part in and to the following blocks and lots of land situated in the city of Little Rock, west of Quapaw line, to wit: Block numbered F, being a triangular-shaped lot at the corner of Cherry and Rock streets and between Rock street and the Quapaw line; block numbered three hundred and forty-four (344), being three hundred feet and one hundred and forty feet wide, and lying between North street and Water street and between Arch street and West Main street; the undivided half part of the west half of block numbered ninety-eight (98), fronting on Spring street between Cherry and Rock streets; the undivided half part of lot numbered five (5), and of twenty feet of the west side of lot numbered four (4) in block ninety-nine (99), fronting on Water street;
the undivided half part of fractional lots numbered ten (10),
33 eleven (11), and twelve (12), in block numbered five (5), fronting on Scott street; the undivided half part of lots numbered seven (7), eight (8), and nine (9) in block numbered six (6); and also the north part of the southeast quarter of section twenty-seven (27), township two (2) north, of range twelve west (divided from the south part by an east and west line), and containing one hundred acres, and originally patented to Charles Sinclair; and also all the other lands, lots, and tenements, hereditaments, and claims to land, equities of redemption, reversions, and remainders of the said party of the first part in the said county of Pulaski; and also all moneys, credits, accounts, notes, bonds or mortages, rents, and all other property due, owing, belonging, or coming to the said party of the first part in the said county of Pulaski and State of Arkansas, and in every and any other part of said State. To have and to hold the said property and premises unto him, the said party of the second part, his executors, and administrators, and successors in trust forever. In trust, however, and to and for the following uses and purposes, to wit: The said property is conveyed for the use and benefit of the Russell Institute of St. Louis, Missouri, and the said party of the second part, his executors, administrators, and successors in trust, hath power hereby, and is hereby directed, absolutely to sell and convey the said real estate hereinbefore described and referred to, or any part thereof, and any right of the said party of the first part may have to any real estate in the said county of Pulaski, as soon as conveniently may be, at such prices and on such terms as he may judge fair and reasonable and safe, and to collect and receive the money therefor, and to convey the same by
34 deed to the purchaser or purchasers thereof, and to take security for any part of the purchase-money, and when paid to give proper acquittances and discharges therefor, and also to collect and get in the said personal property and whatever may be due, owing, or coming to the said party of the first part in the said State of Arkansas, and to account for and pay over the money or proceeds of all sales and collections, in cash, as often as once in each year, or oftener if convenient, to Thomas Allen, president of the board of trustees of said Russell Insti-

tute, at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said party of the second part for the amount so paid and the application thereof, deducting therefrom the reasonable expenses incident to the execution of this trust actually incurred by the said party of the second part, and all legal taxes on said property, and a commission of five per cent. to the said party of the second part for his own services and trouble on all moneys actually collected and paid over by virtue hereof. This trust shall be brought to a close, and all the profits and proceeds of the property herein included, subject to deductions as aforesaid, paid over as herein required, as soon as conveniently may be, and if the same is not concluded in ten years from this date the said trustee, his executors, administrators, or successors in trust, shall expose any and all real property remaining undisposed of at the end of that time to sale by public auction, for cash, and pay over the proceeds as hereinbefore required, excepting any property which may be at that time involved in suit at law or in chancery, and as to such property, if any, the trust shall be brought to a close as soon as practicable after the termination of such suits. And whereas the said party of the first part hath by deeds bearing even date herewith conveyed to the said party of the second part all his property in
35 the counties of Phillips, Monroe, Independence, Desha, Arkansas, and Conway, as well as Pulaski, in the said State of Arkansas, in like manner and for like uses and purposes as herein: Now it is hereby declared that all of said conveyances to one and the same person, and to one and the same use and purpose, and that the same are to be deemed and taken and accounted for as one trust according to the conditions of the deeds respectively. And the said party of the second part covenants faithfully to perform the trusts hereby created.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written

his
WILLIAM + RUSSELL. [L. S.]
mark.
JOHN S. HORNOR. [L. S.]

Done in the presence of (said Russell making his mark in consequence of paralysis of his right arm)—

W. J. HAMMOND,
EVELYN A. BURT.

STATE OF MISSOURI,
County of St. Louis:

Be it remembered that on this 19th day of July, eighteen hundred and fifty-five, before me, the undersigned, clerk of the circuit court within and for the county aforesaid, came William Russell, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and he acknowledged the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I hereto set my hand and affix the seal of said court, at office, in the city of St. Louis, the day and year last aforesaid.

[L. S.] W. J. HAMMOND, *Clerk.*

STATE OF ARKANSAS,
County of Pulaski:

Be it remembered that on this 17th day of September, 1855, personally came and appeared before the undersigned, clerk of the

36 circuit court in and for the county and State aforesaid, John S. Hornor, one of the parties to the above and foregoing deed of trust or instrument of writing, to me personally well known, and acknowledged that he had signed, sealed, and executed the same for the uses, purposes, and considerations therein mentioned, and desired the same to be certified, which is accordingly done.

In testimony whereof I have hereunto set my hand and affixed the seal of circuit court, at office, in Helena, this the day and year last above written.

[L. S.] EDW'D H. COWLEY, *Clerk.*

STATE OF ARKANSAS,
County of Pulaski:

I, Gordan N. Perry, clerk of the circuit court and ex-officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 26th day of October, 1855, and the same is now duly recorded in record-book Z, page 1 to 6.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office this 21st day of Jan'y, 1856.

[L. S.] GORDAN N. PERRY,
Clerk & Ex-officio Recorder.

STATE OF ARKANSAS,
County of Pulaski:

I, Thos. W. Newton, clerk of the circuit court and recorder for the county aforesaid, do hereby certify that the foregoing ten pages contain a true, full, and complete copy of the deed therein recited, as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and official seal this 28th day of March, 1878.

[L. S.] THOS. W. NEWTON, *Clk,*
By W. W. FIELD, *D. C.*

37 EXHIBIT 4.

This deed, made and entered into the nineteenth day of July, A. D. 1855, by and between William Russell, of the city of St. Louis and State of Missouri, party of the first part, and John S. Horner, of the town of Helena, Phillips County and State of Arkansas, party of the second part, witnesseth: That the said party of the first part, for and in consideration of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and for divers other good and valuable considerations him hereto moving, but chiefly for the purpose of founding an institution for the education of youth in St. Louis County, Missouri, hath granted, bargained, and sold and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said party of the second part, his executors and administrators or successors in trust forever, all and singular the following-described lots and lands situated in the county of Phillips and State of Arkansas, to wit: Lots numbered 50, 53, 81, 124, 125, 278, 279, 280, 291, 292, 293, 294, 205, 296, 297, 323, 329, 330, 331, 332, 335, 336, 401, 402, 479, & 480 of the said town of Helena, as the same are represented on the recorded plat of said town; the southeast quarter of section eleven (11), township one (1) south, of range four (4) east, containing one hundred and sixty acres of land, & originally owned by Mat-

thew Longshore; the west half of the southeast quarter of section twenty (20), township one (1) south, range five (5) east, containing eighty acres; the east half of the southwest quarter of same section, township, and range, containing eighty acres; the northwest fractional quarter of section nineteen (19), township two (2) south, range five (5) east, containing eighteen & thirty-five hundredth ($18\frac{35}{100}$) acres. And all the right, title, and interest of the said Russell in and to the following tracts of land in said county of Phillips (intending to con-
38 vey the same by quitclaim only), to wit: U. S. survey numbered 2384, township one (1) south, range five (5) east, containing 400 acres, more or less, and originally owned by Sylvanus Phillips; the southwest quarter of section twenty-five (25), township one (1) south, range two (2) east, containing one hundred and sixty acres, and originally owned by Joseph Legon (or Logan); the southeast fractional quarter of section nineteen (19), township one (1) north, range five (5) east, containing $77\frac{70}{100}$ acres, and originally owned by M. Hanks; the west half of the northeast quarter, the east half of the northwest quarter, and the east half of the southwest quarter of section eighteen (18), township three (3) south, range four east, containing together 240 acres, and originally owned by G. W. Ferebee; the southwest fractional quarter of section (6), township three (3) south, range four (4) east, containing 157 acres, and originally owned by G. W. Ferebee; the northwest quarter of the northwest quarter of section nineteen (19), township three (3) south, range four (4) east, containing $42\frac{74}{100}$ acres, and originally owned by G. W. Ferebee; the undivided half part of the northeast fractional quarter, containing 99 acres, and of the north half of the southeast quarter, containing 80 acres, and of the east half of the northwest quarter, containing 80 acres, and of the northwest quarter of the southwest quarter, containing 40 acres, and of the northwest quarter of the southwest quarter, containing forty acres, all of section ten (10), township one (1) north, range four (4) east; the undivided half part of the southwest quarter of fractional section eleven (11), township one (1) north, range four (4) east, containing $52\frac{06}{100}$ acres; the undivided half part of the northwest fractional quarter of section thirteen (13), containing $48\frac{04}{100}$ acres, and of the northeast fractional quarter of same section, containing $39\frac{34}{100}$ acres, township one (1)
39 north, range four (4) east; the undivided half part of the northeast fractional quarter of section fourteen (14), containing $80\frac{92}{100}$ acres, township one (1) north, range four (4) east; the undivided half part of the southeast, northeast, and northwest quarters of the southwest fractional quarter of section eighteen (18), containing $79\frac{16}{100}$ acres, township one north, range five east; the southeast fractional quarter of section fourteen (14), township two (2) south, range four (4) east, containing $79\frac{20}{100}$ acres, and originally owned by M. Hanks; the east half of the southwest quarter of section four (4), and the east half of the northwest quarter of section eight (8), township five (5) south, range three (3) east, containing together 160 acres of land; and also all other lands, lots, tenements, hereditaments, and claims to lands, equities of redemption, reversions, and remainders of him, the said party of the first part, in the said county of Phillips and in the said State of Arkansas, and also all moneys, credits, accounts, notes, bonds and mortgages, rents, and all other property due, owing, belonging, or coming to the said party of the first part in the said State of Arkansas; to have and to hold the said property and premises unto him, the said party of the second part, his executors, administrators, and successors in trust forever.

In trust, however, and to and for the following uses and purposes, to wit: The said property is conveyed for the use and benefit of the Russell Institute of St. Louis, Missouri, and the said party of the second part, his executors, administrators, and successors in trust, is hereby empowered and directed absolutely to sell and convey the said real estate hereinbefore described and referred to, or any part thereof, and any right the said party of the first part has or may have to any real estate in the said county of Phillips, or in the said State of Arkansas, as soon as conveniently may be, at such prices and on such terms as he
40 may judge fair, reasonable, and safe, and to collect and receive the money therefor, and to convey the same by deed to the purchaser or purchasers thereof, and to take security for any part of the purchase-money, and when paid to give proper acquittances and discharges therefor, and also to collect and get in the said personal property, and whatever may be due, owing, or coming to said party of the first part in the said State of Arkansas, and to account for and pay over the money or proceeds of all sales and collections, in cash, as often as once in each year, or oftener if convenient, to Thomas Allen, president of the board of trustees of the said Russell Institute, at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said party of the second part for the amount so paid and the application thereof, deducting therefrom the reasonable expenses incident to the execution of this trust actually incurred in this behalf by the said party of the second part, including necessary counsel fees and costs to be paid by him in any suit now pending or which may be hereafter brought in the said State of Arkansas affecting the trust property or the rights of the said party of the first part, during the continuance of this trust, and all legal taxes and assessments on said property until sold, which the said party of the second part shall pay, and a commission of five (5) per cent. to the said party of the second part for his own services and trouble on all moneys actually collected and paid over by him by virtue hereof, and reserving a sufficient sum on hand during the continuance of this trust to meet any contingent costs or expenses likely to accrue in relation thereto. This trust shall be brought to a close, and all the profits and proceeds of the property herein included, subject to the deductions aforesaid, paid over as herein required, as soon as conveniently may be, and if the same is not concluded
41 in ten years from this date, the said trustee, his executors, administrators, or successors in trust, shall expose any and all real property remaining undisposed of at the end of that time to sale, by public auction, for cash, and sell the same and pay over the proceeds as hereinbefore required, excepting any property which may be at that time involved in suit, at law or in chancery, and as to such property, if any, the trust shall be brought to a close as soon as practicable after the termination of such suits. Of such sale by action reasonable public notice shall be given by advertisement. And whereas the said party of the first part hath, by three several deeds, bearing even date herewith, conveyed to the said party of the second part all his property in the counties of Monroe, Desha, and Arkansas, Conway, and Independence, and Pulaski, in the said State of Arkansas, in like manner and for the like uses and purposes as herein: Now it is hereby declared that all of said conveyances, together with the present one, are made to one and the same person for one and the same use and purpose, and that the same are, and are to be deemed and taken and accounted for, as one trust, according to the conditions of the deeds respectively, it having been intended by said deeds to convey all the re-

maining property of the said William Russell in the State of Arkansas to the said party of the second part, to and for the use and benefit of the said trustees of the said Russell Institute of St. Louis, Missouri, represented by their president, as aforesaid. And the said party of the second part covenants faithfully to perform the trusts hereby created.

In witness whereof the said parties have hereunto set their hands and seals the day and year first-above written, the said Russell making his mark in consequence of paralysis of his right arm.

WILLIAM + RUSSELL. [L. S.]
JOHN S. HORNOR. [L. S.]

Executed in presence of—
W. J. HAMMOND,
EVELYN A. BURNT.

42 STATE OF MISSOURI,
County of St. Louis, ss:

Be it remembered that on the nineteenth day of July, eighteen hundred and fifty-five, before me, the undersigned, clerk of the circuit court within and for the county aforesaid, came William Russell, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and he acknowledged the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I hereto set my hand and affix the seal of said court, at office, in the city of St. Louis, the day and year last aforesaid.

[L. S.] WM. J. HAMMOND, *Clk.*

STATE OF ARKANSAS,
County of Phillips:

Be it remembered that on this 17th day of September, A. D. 1855, personally came and appeared, before me, the undersigned, clerk of the circuit court in and for the county and State aforesaid, John S. Hornor, one of the parties to the above and foregoing deed of trust or instrument of writing, to me personally well known, and acknowledged that he had signed, sealed, and executed the same for the uses, purposes, and considerations therein mentioned and set forth, and desired the same to be certified, which is hereby accordingly done.

In testimony whereof I hereunto set my hand as clerk as aforesaid, and affix the seal of circuit court, at office, in Helena this day and date last above written.

[L. S.] EDW'D H. COWLEY, *Clerk.*

STATE OF ARKANSAS,
County of Phillips:

43 I, Edward H. Cowley, clerk of the circuit court and ex-officio recorder in and for the county and State aforesaid, do hereby certify that the foregoing is a true and perfect copy of a deed of trust filed in my office for record on the 17th day of September, A. D. 1855, and duly recorded this 24th day of September, A. D. 1855.

EDW'D H. COWLEY, *Clerk.*

STATE OF ARKANSAS,
County of Phillips, ss:

I, D. W. Ellison, circuit clerk and ex-officio recorder for the county aforesaid, do hereby certify that the annexed and foregoing is a true

and correct copy of the deed of trust therein set forth, and the same as appears of record on pages 140, 141, 142, 143, & 144 of record-book "N" of deeds.

In witness whereof I have hereto set my hand and affixed my official seal, on this 29th day of March, 1878.

[L. S.] D. W. ELLISON, *Clerk*,
By S. P. DELDLOEN, *D. C.*

EXHIBIT No. 5.

This deed of conveyance, made, executed, and delivered this 16th day of February, A. D. 1874, by and between John S. Horner, of Phillips County, Arkansas, as trustee, as hereinafter stated, of the first part, and Thomas Allen, of the city of St. Louis, in the county of St. Louis and State of Missouri, of the second part, witnesseth: That whereas, by his deed bearing date the 19th day of July, A. D. 1855, executed by William Russell, of St. Louis, in the State of Missouri, and by said John S. Horner, as evidence of his acceptance of the trust thereby created, which deed is now of record in the recorder's office of the
44 county of Phillips, in record-book "N" of deeds, pages 140–144, the said William Russell granted, bargained, sold, and conveyed to the said J. S. Hornor, his executors, administrators, or successors in trust, for certain objects and purposes, and upon certain trust in said deed expressed, and therein among other the following tract of land, to wit: The southeast quarter of section eleven (11), in township one (1) south of the base line, and in range four (4) east of the 5th principal meridian, containing, according to the public surveys, one hundred and sixty acres, situate in the county of Phillips and State of Arkansas aforesaid, with full power and authority to the said trustee to sell and dispose of the said land in absolute property upon such terms and for such prices as the said trustee should judge fair, reasonable, and safe; and whereas the said trustee has granted, bargained, and sold the above-described tract of land to the said party of the second part, for the price and consideration of three hundred and twenty dollars, which has been fully paid to the said Horner, as such trustee: Now, in consideration of the premises, the said party of the first part, trustee as aforesaid, has granted, bargained, sold, remised, released, confirmed, transferred, made over, and conveyed, and doth hereby grant, bargain, sell, release, remise, confirm, transfer, make over, and convey, unto the said party of the second part, his heirs and assigns forever, the aforesaid, to wit, the southeast quarter of section eleven (11), in township one (1) south of the base line, and in range four (4) east of the 5th principal meridian, containing, according to the public surveys, one hundred and sixty acres, situate in the county of Phillips and State of Arkansas aforesaid, with all the hereditaments, privileges, and appurtenances thereto belonging, to have and to hold the same unto the said
45 party of the second part, his heirs and assigns forever; and the said party of the first part hereby assigns and transfers unto the said party of the second part, his heirs and assigns, all covenants or contracts, and every use and benefit thereof, or damages in respect thereof, pertaining to the said tract of land, or the title thereof, which was vested in him, or may have become vested in him, or in anywise available to, enforceable or recoverable by, said party of the first part, under and by virtue of the said conveyance or deed to him; it being the object and intention of said party of the first part, and he does hereby substitute and subrogate said party of the second part, his heirs and

assigns, to all and every title, and every power, right, and privilege, in law and equity, in respect to the said tract of land, or covenants or contracts in respect thereof, and which are or could become available to him in virtue of said conveyance from said William Russell, and it is distinctly understood that said party of the first part acts herein in his capacity of trustee, and does not personally bind himself in any respect, or to any extent, by any express or implied covenant or obligation in respect of the premises.

In testimony whereof the said John S. Horner, as trustee as aforesaid, has hereunto set his hand and seal, the day and year first above written.

JOHN S. HORNER, [SEAL.]
Trustee of William Russell.

STATE OF ARKANSAS,
County of Phillips, ss:

Be it remembered that on the 18th day of February, A. D. 1874, at the county aforesaid, before me, the undersigned, an acting and duly-commissioned notary public in & for the said county, personally
46 came and appeared John S. Horner, the grantor in the foregoing deed of conveyance, who is well known to me, and acknowledged that he had, as trustee of William Russell, voluntarily signed, sealed, and delivered the same, for the consideration, uses, and purposes therein named, and I do so hereby certify.

Given under my hand the day and date last above mentioned.

[L. S.] GREENFIELD QUARLES,
Notary Public.

STATE OF ARKANSAS,
County of Phillips, ss:

I, D. W. Ellison, circuit clerk and ex-officio recorder in and for the county and State aforesaid, do hereby certify that the above is a true and correct copy of the original deed of conveyance or instrument of writing filed for record in my office on the 3rd day of March, 1874, and duly recorded this the 2nd day of April, 1874.

[L. S.] D. W. ELLISON,
Clerk & Ex-officio Recorder.

And on the 19th day of April, 1878, a subpœna in chancery was issued in said case, which is in words and figures following, to wit:

Subpœna in chancery.

UNITED STATES OF AMERICA,
Eastern District of Missouri, sct:

In the circuit court of the United States in and for said district.

The President of the United States to Thomas Allen, Jane G. Russell, Sarah E. Powell, Cornelia F. Fulkerson, Joseph Neill, William Neill, Thomas G. Houston, Margaret E. Martin, Russella A. Bates, Mary L. Patterson, John G. Russell, Charles S. Russell, Julia A. B. Russell, Russella Parker, Martha J. Russell, Julia E. Russell, James Russell, Julia A. Morrison, Viginia S. Penquet, William R. Moyer, Joseph C. Moyer, John Moyer, Mary Breckenridge, Margaret Highly,
47 Harrison Sweeney, A. R. Sweeney, Eliza A. Jamison, Martha J. Roberts, Angeline R. Moyer, William P. Sloan, Sarah A. Sloan, Lewellyn M. Russell, Jefferson C. Russell, and John H. Russell, greeting:

You are hereby commanded to be and appear at rules to be held at

the office of the clerk of the circuit court of the United States in and for the eastern district of Missouri, on the first Monday of June next, at the city of St. Louis, then and there to answer the bill of complaint of James D. Russell, a citizen of the State of Nebraska, and Margaret C. Gavitt, a citizen of the State of Arkansas, filed against you on the 16th day of April, 1878; hereof fail not.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 19th day of April, 1878. Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*,
By T. L. CRAWFORD, *Deputy*.

MEM.—The defendants to enter their appearance in this suit in the clerk's office on or before the day at which is returnable; otherwise the bill may be taken pro confesso.

M. M. PRICE, *Clerk*,
By T. L. CRAWFORD, *Deputy*.

Marshal's return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

I have executed this writ by delivering a copy thereof to the within-named Thomas Allen, at St. Louis, in said district, this 3rd day of May, 1878.

H. W. LEFFINGWELL,
United States Marshal, Eastern District of Missouri,
By JAMES B. GEGGIE, *Deputy*.

And afterwards, on the 3rd day of August, 1878, the defendant Thomas Allen filed his demurrer to the bill of complaint herein, which is in words and figures following, to wit:

48 *Demurrer to bill.*

In the circuit court of the United States for the eastern district of Missouri, of the March term thereof, A. D. 1878.

JAMES D. RUSSELL AND MARGARET C. GAVITT, complainants,
vs.
THOMAS ALLEN ET AL., DEFENDANTS. } In chancery.

The demurrer of Thomas Allen, one of the defendants to the bill of complaint of James D. Russell and Margaret C. Gavitt, complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer showeth that the said complainants have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against this defendant; wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any other or further answer to

the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

W. R. DONALDSON,
THOROUGHMAN & WARREN,
Sol's for Defendant Thomas Allen.

Joinder in demurrer.

WM. BROWN,
Solicitor for Compl'nts.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

H. S. Warren, being duly sworn, on his oath says that he is the agent and attorney of the defendant Thomas Allen herein, and
49 personally knows the facts touching the bill of complaint filed against defendant Allen & others by complainants, James D. Russell and Margaret C. Gavitt, and states that the above and foregoing demurrer is not interposed for delay or vexation, and that this affidavit is made by affiant on account of the absence of said defendant Allen from this jurisdiction and inability to make the same.

H. L. WARREN.

Subscribed and sworn to before me this August 5th, 1878.

C. M. WARD,
U. S. Com'r, Eastern Dist. of Mo.

I, H. L. Warren, of counsel for defendant Thomas Allen, do hereby certify that in my opinion the above demurrer is well founded in point of law.

H. L. WARREN,

And afterwards, at the March term, 1879, of said court, and on the 17th day of March, the following proceedings were had in said case, to wit:

Decree.

JAMES D. RUSSELL AND MARGARET C. GAVITT, complainants,
vs.
THOMAS ALLEN, JANE G. RUSSELL, SARAH E. Powell, Cornelia F. Fulkerson, Joseph Neill, William Neill, Thomas G. Houston, Margaret E. Martin, Russella A. Bates, Mary L. Patterson, John G. Russell, Julia A. B. Russell, Russella Parker, Martha J. Russell, Julia E. Russell, James Russell, Julia A. Morrison, Virginia A. Penquet, William R. Moyer, Joseph C. Moyer, John Moyer, Mary Breckenridge, Margaret Highly, Harrison Sweeney, A. R. Sweeney, Eliza A. Jamison, Martha J. Roberts, Angeline R. Moyer, William P. Sloan, Sarah A. Sloan, Lewellyn M. Russell, Jefferson C. Russell, and John H. Russell, defendants.

50 And now, on this 17th day of March, A. D. 1879, the same being one of the days of the March term, A. D. 1879, of this

court, came the parties, the complainants by their solicitor, William Brown, esquire, and the respondent Thomas Allen by his solicitors, Messrs. Thoroughman & Warren and W. R. Donaldson, and the said cause coming on to be heard upon the demurrer of the respondents to the complainants' bill and the joinder of complainants thereon, and the court having heard the argument of counsel, and being sufficiently advised in the premises, doth order, adjudge, and decree that the demurrer of respondents to complainants' bill be, and is hereby, sustained; and it is therefore thereupon ordered, adjudged, and decreed that the complainants' bill be dismissed.

To which ruling of the court the complainants except, and pray an appeal to the Supreme Court of the United States, which is allowed upon the complainants entering into their bond in the penal sum of five hundred dollars, conditioned according to law.

And afterwards, at said March term, 1879, the following further proceedings were had in said case, on the 21st day of March, to wit:

Bond approved.

JAMES D. RUSSELL ET AL., COMPLAINANTS,
vs.
THOMAS ALLEN ET AL., DEFENDANTS.

This day come the complainants, by their solicitors, and present their bond for an appeal to the Supreme Court of the United States, which bond is approved and ordered to be filed as of March 17th, 1879.

It is further ordered that the clerk of this court make out and certify to the said Supreme Court of the United States a full and complete transcript of the record and proceedings herein.

And the said bond so approved as aforesaid is in the words and figures following, to wit:

Bond.

51 Know all men by these presents that we, James D. Russell, Margaret C. Gavitt, Oliver P. Powell, William H. Fulkerson, are held and firmly bound unto Thomas Allen in the full and just sum of five hundred dollars, to be paid to the said Thomas Allen, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of March, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at the March term, 1879, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between James D. Russell and Margaret C. Gavitt, plaintiffs, and Thomas Allen and others, defendants, a decree was rendered against the said plaintiffs, and the said plaintiffs having obtained an appeal of the said court to reverse the decree in the aforesaid suit to the Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute said appeal to effect, and answer all damages

and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

JAMES D. RUSSELL. [SEAL.]
MARGARET C. GAVITT, [SEAL.]
By JAMES D. RUSSELL. [SEAL.]
O. P. POWELL. [SEAL.]
WM. A. FULKERSON. [SEAL.]

Approved by—

JOHN F. DILLON,
Circuit Judge.

52 The following opinion was delivered by the court:

United States circuit court, eastern district of Missouri, March 17, 1879.

A conveyance of realty and other property in trust "for the purpose of founding an institution for the education of youth in St. Louis County, Mo.," sustained.

TREAT, J:

A bill has been filed in equity by the heirs of William Russell, deceased, to subject to their demand certain funds in the hands of Allen, by him received in connection with the grants made. A demurrer to the bill is interposed.

In 1855 the decedent executed to Horner certain conveyances of realty and other property, in trust "for the purpose of founding an institution for the education of youth in St. Louis County, Missouri." Said deed prescribed the manner in which said trustee should execute his trust. The deed expresses that the conveyances were "for the use and benefit of the Russell Institute of St. Louis, Missouri," and directed that the proceeds of said property should be paid over, "in cash, as often as once in each year, or oftener if convenient, to Thomas Allen, president of the board of trustees of the said Russell Institute, at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said" trustee Horner. There were several deeds executed by the grantor at the same time for property in different counties in the State of Arkansas, and the deed before us of July 19, 1855, declares as follows:

"And whereas the said party of the first part hath, by three several other deeds, bearing even date herewith, conveyed to the said party of the second part all his property in the counties of, etc., in the like manner and for the like uses and purposes as herein: Now it is hereby declared that all of said conveyances, together with the present one, are made to one and the same person; Horner, for one and the same use and purpose, and that the same are, and are to be deemed and taken and accounted for, as one trust, according to the conditions of thedeeds respectively, it having been intended by said deeds to convey all the remaining property of the said William Russell in the State of Arkansas to the said party of the second part, to and for the use and benefit of the said trustees of the Russell Institute of St. Louis, Missouri, represented by their president as aforesaid."

The bill charges that said Horner paid to said Allen divers sums of money, etc.; that no such institute existed at the date of the grants, or has since been created, that the purposes of the charity are too vague to be enforced, etc., etc., and asks that said Allen be compelled to account for and pay over the funds, etc., so received by him, to said heirs.

The legal and equitable propositions involved have been discussed at great length in many English and American decisions, a review of

which would require more time and labor than are at our command. Many of those decisions pertain to the force and effect of the statute of Elizabeth, the doctrine of cy-pres, and the power "parens patriæ." In this country, after long doubt and disputation, the doctrine has been established that where a grant or devise for charitable uses is made, and the donee is capable of executing the trust vested in him, the grant or devise should be upheld if the beneficiary or charitable object is stated in such a manner, or with such distinctness, that chancery can ascertain what it is, so as to enforce the trust. In construing such instruments, equity adopts, not the old rule favoring the heir, as in England, but the juster rule of effecting the intent of the grantor or devisor. In England the doctrine of cy-pres and of "parens patriæ" were resorted to mainly to overcome the general rule, which, under British institutions, favored the heir and perpetuation of estates. Under American institutions no such policy, and consequently no such general rule, ever obtained. The just rule worked out in English courts, through the doctrines or powers named, although such powers do not exist in this country, is, as to charitable uses, made, though not technically yet to a large extent practically, applicable in this country. By this it is not meant that the cy-pres doctrine has any force here, but merely that for the purpose of upholding conveyances for charitable uses American courts of equity will, wherever by a liberal construction it can be done, ascertain the designated or designed charity and enforce the intentions of the grantor. The various decisions of the United States Supreme Court and of other courts, particularly within the past decade, are based on the sound and just doctrine that the intention of the grantor or devisor shall prevail. Hence when by the terms of the grant it is clear that the heir was to be cut off, he will be held cut off if the trust can be, under even a liberal construction, upheld for its designed charitable purpose.

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Of course, if the grant is too vauge and indefinite to enable the chancellor to detect to what charity the grant referred or was applicable, then, as the estate was not conveyed away, it (the estate) would necessarily follow the prescribed course of descent. In other words, if the decedent had not disposed of his property otherwise, the law of descents and distributions would govern. In the light of these doctrines, now fully recognized, this court must look to the conveyances in question. The purpose of the grantor was to found the Russell Institute; to have the avails of the property conveyed vested ultimately in a board of trustees for said institute, and in the mean time to have yearly and other payments of said avails or proceeds paid over to Allen, president, and, what is very significant, to him as representing said trustees.

It is obvious that the grantor knew that no such institute existed at the date of the grant, for the grant was to found such an institute in the future. In that condition of affairs, he expressed with sufficient clearness that as the fund should be created from time to time by Horner, the trustee, it was to be paid over to Allen, as president, whose "receipt therefor was to be a full discharge," and that at the expiration of the ten years named Horner's trust was, as soon as practicable thereafter, to cease, and all funds then in his hands be paid in the same manner as prior payments had been made to said Allen, who, as president, was to represent said board of trustees.

It is obvious that the intention of the grantor was to have the proceeds of the property lodged in the hands of Allen, not for his indi-

vidual benefit, but for the purpose of founding thereafter the designated institute, of which Allen was to be president.

In the discharge of his trust, then, it is for Mr. Allen, at the proper time, to cause such an institute to be organized, whose trustees will shape the institute, and determine the persons to whom and the manner in which endowment shall be applied.

It is obvious that the grantor placed the largest measure of confidence in Mr. Allen with respect to the manner of founding such institute, or calling it into corporate existence. Until sufficient funds were received therefor such an institute could not be beneficially founded. Of course, Mr. Allen could not unreasonably delay action, nor postpone the time indefinitely. In other words, the confidence reposed, if abused by unnecessary delay or otherwise, could be controlled by the supervision of the proper court of equity, when thereto duly called upon to act. It seems that the purpose of Mr. Russell in creating or providing for the needed endowment did not contemplate that the result could be achieved before the lapse of ten years, for the annual payments to Allen from the date of the conveyances, it is obvious, would not furnish funds sufficient for founding such an institute at the expiration of the first or of any succeeding year prior to the expiration of the tenth year, when Horner's trust was to cease by forced sales of the property, with the exceptions named. In the mean time Allen, receiving the annual payments and giving to Horner acquittances, was to retain the accumulating funds, until at the expiration of the ten years he should be able to ascertain the aggregate amount applicable to the charitable use. He could not ascertain the amount before that time, and hence any previous attempt to call such an institute into corporate existence would have been premature. It appears that the con-

54 tolling intent of the grant is that the accumulating funds should be placed in Allen's hands, so that at the expiration of ten years he could cause such an institute to be founded, under the corporation laws of Missouri, with a board of trustees, of which he was to be president, and that when said corporation had been so created he should turn over to it the aggregate funds in his hands. The board would thus be enabled to determine, in its discretion, with due regard to the intent of the founder, what should be the scope and details of the institute. The ultimate determination of the mode of administering the charity, whether by free or paid instruction to pupils, etc., would be for that board's action and discretion when organized.

There are many interesting questions involved in the administration of such charitable uses which are not before us for decision; such as the proper forum and parties to compel due and prompt administration of the "use" when the person charged to act fails to do so—that is, whether a United States court, before which the subject comes incidentally, can lay hold of and compel the proper administration, under its supervision, or whether application therefor must not be made exclusively to the more appropriate State courts. However that may be, in the absence of any proceeding by Allen in the nature of a cross-bill, asking the direction of this court as to the manner in which he shall execute his trust, and in the absence of any prayer of the plaintiffs in this case looking to that end, we are not called upon to decide with respect thereto. We must dispose of the questions before us as they are presented, and not go beyond them. The plaintiffs are here in hostility to the existence of the indicated fund, denying that there is such a fund for the alleged charitable uses and claiming that the funds rightfully belong to them personally. They do not ask for the admin-

istration of the fund to charitable uses, whereby their personal claim thereto would be defeated; and consequently this court has only one proposition to decide, viz, whether under the grants made and the allegations of the bill the plaintiffs have shown any right in themselves personally to the fund in question. From what has already been stated, it is clear that they have no such personal right, that it is evident the grantor meant to cut off his heirs as to the property granted, and that the charity which was to be the object of his bounty is sufficiently definite to enable the funds created to be definitely applied to the charitable use contemplated.

The demurrer to the bill is sustained.

Dillon, judge, concurs.

55 In the Supreme Court of the United States of America, October term, A. D. 1879.

JAMES D. RUSSELL, APPELLANT,
vs.
THOMAS ALLEN ET AL., APPELLEE.

Appeal from c. c't U. S. for eastern dist. of Mo.

And now on this day comes the appellant, by William Brown, his attorney, and says that there is manifest error in the record of the proceedings aforesaid, in this:

1. The court erred in sustaining the demurrer of appellee to appellant's bill of complaint.

2nd. The court erred in dismissing appellant's bill of complaint.

And this the appellant is ready to verify. Whereupon he prays that the decree of the circuit court of the United States for the eastern district of Missouri may be reversed, &c.

WILLIAM BROWN,
Solicitor for Appellant.

(Indorsed:) Russell vs. Allen. Appeal. Assignment of errors to be attached to transcript of record.

56 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true copy of the record and proceedings had in case No. 1243, of James D. Russell et al., plaintiffs, against Thomas Allen et al., defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 4th day of August, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By T. L. CRAWFORD,
Deputy.

(Indorsement on cover:) No. 316. James D. Russell et al., appellants, vs. Thomas Allen et al. E. Missouri C. C. U. S. Filed 11th October, 1879.

vidual benefit, but for the purpose of founding thereafter the designated institute, of which Allen was to be president.

In the discharge of his trust, then, it is for Mr. Allen, at the proper time, to cause such an institute to be organized, whose trustees will shape the institute, and determine the persons to whom and the manner in which endowment shall be applied.

It is obvious that the grantor placed the largest measure of confidence in Mr. Allen with respect to the manner of founding such institute, or calling it into corporate existence. Until sufficient funds were received therefor such an institute could not be beneficially founded. Of course, Mr. Allen could not unreasonably delay action, nor postpone the time indefinitely. In other words, the confidence reposed, if abused by unnecessary delay or otherwise, could be controlled by the supervision of the proper court of equity, when thereto duly called upon to act. It seems that the purpose of Mr. Russell in creating or providing for the needed endowment did not contemplate that the result could be achieved before the lapse of ten years, for the annual payments to Allen from the date of the conveyances, it is obvious, would not furnish funds sufficient for founding such an institute at the expiration of the first or of any succeeding year prior to the expiration of the tenth year, when Horner's trust was to cease by forced sales of the property, with the exceptions named. In the mean time Allen, receiving the annual payments and giving to Horner acquittances, was to retain the accumulating funds, until at the expiration of the ten years he should be able to ascertain the aggregate amount applicable to the charitable use. He could not ascertain the amount before that time, and hence any previous attempt to call such an institute into corporate existence would have been premature. It appears that the con-

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There are many interesting questions involved in the administration of such charitable uses which are not before us for decision; such as the proper forum and parties to compel due and prompt administration of the "use" when the person charged to act fails to do so—that is, whether a United States court, before which the subject comes incidentally, can lay hold of and compel the proper administration, under its supervision, or whether application therefor must not be made exclusively to the more appropriate State courts. However that may be, in the absence of any proceeding by Allen in the nature of a cross-bill, asking the direction of this court as to the manner in which he shall execute his trust, and in the absence of any prayer of the plaintiffs in this case looking to that end, we are not called upon to decide with respect thereto. We must dispose of the questions before us as they are presented, and not go beyond them. The plaintiffs are here in hostility to the existence of the indicated fund, denying that there is such a fund for the alleged charitable uses and claiming that the funds rightfully belong to them personally. They do not ask for the admin-

istration of the fund to charitable uses, whereby their personal claim thereto would be defeated; and consequently this court has only one proposition to decide, viz, whether under the grants made and the allegations of the bill the plaintiffs have shown any right in themselves personally to the fund in question. From what has already been stated, it is clear that they have no such personal right, that it is evident the grantor meant to cut off his heirs as to the property granted, and that the charity which was to be the object of his bounty is sufficiently definite to enable the funds created to be definitely applied to the charitable use contemplated.

The demurrer to the bill is sustained.

Dillon, judge, concurs.

55 In the Supreme Court of the United States of America, October term, A. D. 1879.

JAMES D. RUSSELL, APPELLANT,
vs.
THOMAS ALLEN ET AL., APPELLEE.

Appeal from c. c't U. S. for eastern dist. of Mo.

And now on this day comes the appellant, by William Brown, his attorney, and says that there is manifest error in the record of the proceedings aforesaid, in this:

1. The court erred in sustaining the demurrer of appellee to appellant's bill of complaint.

2nd. The court erred in dismissing appellant's bill of complaint.

And this the appellant is ready to verify. Whereupon he prays that the decree of the circuit court of the United States for the eastern district of Missouri may be reversed, &c.

WILLIAM BROWN,
Solicitor for Appellant.

(Indorsed:) Russell vs. Allen. Appeal. Assignment of errors to be attached to transcript of record.

56 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true copy of the record and proceedings had in case No. 1243, of James D. Russell et al., plaintiffs, against Thomas Allen et al., defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 4th day of August, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By T. L. CRAWFORD,
Deputy.

(Indorsement on cover:) No. 316. James D. Russell et al., appellants, vs. Thomas Allen et al. E. Missouri C. C. U. S. Filed 11th October, 1879.

FILED
OCT. 23 1882
JAMES H. MCKENNEY, CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 188

JAMES D. RUSSELL et al.,
Appellants,
vs.
THOMAS ALLEN et al.,
Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

BRIEF AND ARGUMENT

WILLIAM BROWN, Solicitor for Appellants.



In the Supreme Court of the United States,

October Term, 1881.

JAMES D. RUSSELL et al.,
Appellants,
vs.
THOMAS ALLEN et al.,
Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT OF THE CASE.

On the 19th day of July, A. D. 1855, William Russell, late of St. Louis, Mo., executed to John S. Horner four trust deeds by which he conveyed to Mr. Horner the real estate and personal property therein described upon the trusts specified. The four deeds are alike except as to the property described. An abstract of one of the deeds will be of convenience to the court; it is as follows:

This deed, made * * * * the 19th day of July, 1855, by William Russell, of St. Louis, Mo., of the first part, and John S. Horner, of Helena, Ark., of second part, witnesseth: That the party of first part, in consideration of one dollar in hand paid and for other considerations, *but chiefly for the purpose of founding an institution for the Education of Youth, in St. Louis County, Missouri,* hath granted, &c., and by these presents doth grant and convey unto the party of the second part, his

executors, &c., and *successors in trust, forever*, the following described tracts of land in Conway county, Ark., to-wit: (here follows description of property), to have and to hold the said property unto him, the party of the second part, his exectors and *successors in trust forever; in trust, however, and to the following uses and purposes, to-wit: the said property is conveyed for the use and benefit of the "Russell Institute of St. Louis, Missouri."*

And the party of the second part, his executors, &c., and successors in trust, is empowered to sell and convey the property, and receive the money therefor, &c., to collect and get in the personal property, &c., to give acquittances therefor, &c., and account for and pay over proceeds in cash as often as once in each year or oftener, if convenient, *to Thomas Allen, president of the board of trustees of the Russell Institute of St. Louis, Missouri*, and his receipt shall be a full discharge of the party of the second part for the amount so paid and the application thereof, deducting the reasonable expenses incident to the execution of this trust by the said party of the second part, the taxes, and a commission of five per cent to the party of the second part on money paid over by him. The trust shall be brought to a close as soon as it conveniently may be, and if not concluded in ten years, the party of second part shall sell property at auction and pay proceeds as hereinbefore required.

And whereas the party of first part hath, by several deeds bearing even date, herewith conveyed to second party all his property in the counties of Phillips, Desha, Monroe, Arkansas and Pulaski in the state of Arkansas, in like manner and for like uses and purposes as herein: Now, it is hereby declared that all of said conveyances, including this, are made to one and the same purpose, and that the same are and are to be deemed and taken and accounted for as one trust according to the conditions of the deeds respectively, it having been intended by said deeds and this present one to convey all the remaining property of the said William Russell in the state of Arkansas *to the said party of the*

second part, to and for the use and benefit of the said Russell Institute of St. Louis, Missouri.

These deeds are signed by Mr. Russell by his mark, and, in explanation thereof, it is stated in one of them that he was, at the time, suffering from paralysis.

The four deeds are made exhibits to the bill filed in this case. The above abstract contains all the recitals, declarations of trust and powers given, which it is believed will be of aid to the court in the determination of the questions submitted.

Early in the year 1856 Mr. William Russell, then a resident and citizen of St. Louis, Missouri, died intestate, leaving no widow or child or descendants of a child surviving him, but leaving a brother and descendants of his brothers and sisters. From time to time Mr. Horner sold and converted into cash the property conveyed to him by the deeds aforesaid up to the time of the civil war and afterwards; the cash he paid over to Mr. Thomas Allen, one of the respondents. Finally, in the year 1874, upon the request of Mr. Allen, Mr. Horner conveyed to him the property remaining undisposed of, as will be seen by Exhibit 5 to the bill.

The complainants, who are a nephew and niece of Mr. Russell, learning that no part of the fund had ever been appropriated to the use of "Russell Institute," and that, in fact, no such body had ever an existence, and regarding it as too late to effectuate any purpose which Mr. Russell could have had in view, and believing, in fact, that he never had a definite purpose in regard to such an institute, in April, 1878, exhibited their bill in the circuit court of the United States for the Eastern District of Missouri, to which Mr. Allen and the next of kin to Mr. Russell, not joining as complainants, were made respondents; by which it is claimed that the funds in Mr. Allen's hands should be distributed to the next of kin of Mr. Russell as intestate estate under the laws of Missouri.

The following is an abstract of the bill:

BILL OF COMPLAINT.

The bill, after a statement of the parties in interest, the jurisdictional facts, the ownership of the propert by Mr. Russell, its conveyance to Mr. Horner, etc., alleges:

1st. That complainants are heirs at law of Mr. William Russell, who died intestate in 1856, at St. Louis.

2d. That the conveyances were made upon the trusts and for the uses set out in the deeds.

3d. That at the date ot the deeds there was not, nor has there ever been before or since the said deeds, up to the date of the filing of this bill, any corporation or educational institution at St. Louis county, Mo., known as the "Russell Institute;" nor has there been in existence, at any time up to the date of the filing of this bill, any educational institution at St. Louis county or elsewhere, by whatever name, to which Mr. William Russell could have referred in said declarations of trust.

4th. That at the date of the execution of said deeds Mr. William Russell was, from paralysis, infirm in body and weak in mind.

5th. That "Russell Institue" has never been founded.

6th. No authority was given to Mr. Horner, Mr. Allen, nor to any other person or corporation, to organize a "Russell Institute;" nor has any such authority been exercised or claimed by any person or corporation.

7th. That at the date of the execution of the deeds, there was not, nor is there now, nor has there ever been, any donee capable of receiving, holding and administering the trust fund.

8th. The beneficiaries cannot be determined from the deeds or otherwise, and there being no donee capable of taking, holding and administering the trust and determining the beneficiaries, the trust fund belongs to the heirs at law of Mr. William Russell, as intestate estate.

9th. Mr. Horner executed the trust confided to him so far as to convert the property into cash, and paid the proceeds of the same to Mr. Thomas Allen.

10th. The Board of Trustees of Russell Institute never had an existence, and such board and the presidency of Mr. Allen are imaginary.

11th. That, not having sold all the lands conveyed to him within the time limited, he did, on the request of Mr. Allen, convey to Allen the lands described in Exhibit 5, on the 16th of February, 1874.

12th. That Allen holds the money and property received from Horner, and refuses to account for it, although a demand has been made.

The foregoing are the material allegations of the bill, all of which, so far as well pleaded, are admitted by the demurrer to be true.

DEMURRER TO THE BILL.

Respondent Allen, being the only one served with process, filed a demurrer to the bill, and assigned as cause of demurrer the want of equity in the bill.

The circuit court sustained the demurrer and dismissed the bill; to which ruling of the court the complainant excepted, and prosecute this appeal to reverse the decision of the circuit court for the Eastern District of Missouri.

ERRORS ASSIGNED.

Appellants assign upon the record the following errors:

I.

The court erred in sustaining the demurrer of appellee to appellant's bill of complaint.

II.

The court erred in dismissing appellant's bill of complaint.

BRIEF AND ARGUMENT OF APPELLANTS.

MAY IT PLEASE THE COURT:

It is an elementary principle that a demurrer confesses every fact well pleaded in the paper to which it is interposed. It is pertinent then, at the outset, to inquire what facts are admitted by the appellees to exist. They are:

1. That Mr. William Russell died at St. Louis, Mo., intestate, in 1856, leaving no widow or child or descendants of a child surviving.

2. That the complainants are heirs at law of William Russell.

3. That the conveyances were made to Mr. Horner upon the trusts stated in the deeds.

4. That there was not at the date of the deeds, nor has there ever been, before or since the deeds, to the time of filing this bill, any corporation or educational institution at St. Louis county, Mo., known as "*Russell Institute*," nor has there been in existence at any time any educational institution at St. Louis or elsewhere, by whatever name, to which Mr. William Russell could have referred in said declarations of trust.

5. That at the time he executed the deeds Mr. Russell was infirm in body and weak in mind.

6. That "*Russell Institute*" has never been founded.

7. That "the Board of Trustees of Russell Institute" never had an existence, and such board and the presidency of Mr. Allen, are imaginary.

8. That Mr. Horner sold the property in part and paid the proceeds to Mr. Allen, and finally in 1874 conveyed to him the portion remaining unsold.

9. That Mr. Allen holds the money and property received from

Mr. Horner and refuses to account for it, though a demand has been made.

10. That there was not, nor is there now, nor has there ever been any donee capable of receiving, holding and administering the trust fund.

11. That the beneficiaries cannot be determined from the deeds or otherwise.

12. That since the beneficiaries cannot be determined from the deeds or otherwise, and there being no donee capable of taking, holding and administering the trust and determining the beneficiaries, the trust fund belongs to the heirs at law of Mr. William Russell as intestate estate.

All facts may be said to be well pleaded which have a legitimate bearing upon, or relation to, the fund sought to be effected by the particular proceeding; and whilst it may be conceded that an averment which is a conclusion of law from assumed facts is not to be regarded in the determination of the right, it is neither unusual nor inappropriate for the pleader to make his claim in that way. At least, the facts stated are not hurt by the addition of the conclusion.

The question then for the determination of the court is, whether under the facts stated the heirs at law of William Russell have an interest in the proceeds of the property sold by Mr. Horner and which now lie in the hands of Mr. Thomas Allen. That they have, is beyond question, unless by the deeds of Mr. Russell to Mr. Horner there has been created a legal trust for a charitable use.

It is respectfully submitted that the trust attempted to be created by these deeds is invalid for several reasons.

1. The conveyances are obnoxious to the objection that they create a perpetuity.

2. The uses declared are not charitable, and in consequence the trusts created are to be tested by the law applicable to trusts generally.

3. Assuming the uses to be charitable, there is no donee capable of taking and administering the fund to the use intended.

4. The charity fails because the use is not so far defined as to be capable of being specifically executed by a court of chancery.

5. It fails for the want of ascertained beneficiaries.

Some of the questions which in former cases have arisen to vex both court and counsel have been set at rest by this court in a late decision. It is no longer material to inquire whether the "*statute of Elizabeth*" is in force in the state where the controversy has arisen concerning charitable uses; nor need time be taken in treatment of the doctrine of *cy-pres*. As to the one originally important factor, it is said "that the law as to such uses, and the jurisdiction of the chancellor, and the extent to which it was exercised, before and after the enactment of the statute, were just the same. It is, therefore, quite immaterial whether the statute was or was not a part of the law of Maryland. The controversy must be determined upon the general principles of jurisprudence, and the presence or absence of the statute cannot affect the result.

Ould vs. Washington Hospital, &c., 5 Otto, 303.

As to the other, the *cy-pres* doctrine, it is now determined, and indeed conceded upon all hands, that the courts of this country can exercise none but a judicial power.

Perry on Trusts, Vol. 2, Sections 713, 719, 731, and note.

I.

The conveyances create a perpetuity.

The grant is to Mr. Horner and to his successors in trust forever, in trust to pay to an imaginary being, which never had an existence, and which, in the circumstances, can never have. Under the admissions of the demurrer, there was never a "Russell Institute" to which Mr. Russell

could have referred in his declarations of the uses proposed; there was never a "board of trustees of Russell Institute," and of necessity there could be no "president" thereof. Neither did Mr. Russell appoint or found the object of his bounty, or repose in another the power to do so. These facts being given the court must see that by the limitation of the deeds Mr. Horner could do nothing but hold to the fund. This limitation not only "*tended*" to, or "*might*," "take the subject of it out of commerce for a longer period than a life or lives in being and twenty-one years beyond," but of necessity did so. This is a perpetuity.

Bouvier Law Dict., tit. Perpetuity.

In the case at bar, it being legally impossible for the "Russell Institute," which was in Mr Russell's mind at the time, ever to take, the rule that a gift may, in proper circumstances, be upheld to a charity not *in esse* at the time, but to come into existence, provided there is no gift of the property in the first instance, or perpetuity in a prior taker, does not relieve this dilema. There being no "Russell Institute" at the time of the execution of the Horner deeds, Mr. Russell having erected none, having appointed no one to do so, and having died, there can be no one ever to take this fund. Any number of "Russell Institutes," so called, might now be organized by officious or designing persons, but none such could be judicially determined to be *the one* to which Mr. Russell referred in the Horner deeds. He did not say that the fund should go to such an Institute as *A.*, *B.* or *C.* might organize, or the legislature of Missouri might incorporate, and no court can say so for him.

"As it is forbidden to create perpetuities by common law conveyances, so it is equally illegal to attempt to create perpetuities through the creation of trusts. A perpetuity will no more be tolerated when it is covered by a trust than when it displays itself undisguised in the conveyance of the legal estate."

Perry on Trusts, Section 737.

Ould ~~Onlo~~ vs. Washington Hospital, supra.

Compassed as it now is the fund is inalienable and must forever remain so if the requirements of the deeds are obeyed.

II.

The use for which the trust was created is not charitable.

In respect to the law of uses, Mr. Binney's definition of "charity" is probably the one which would prove most acceptable to the profession; it is:

"Whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private or selfish."

It does not become us, nor do we design, to question the motives of Mr. Russell; we would not attribute to him a motive that is "*personal*," "*private*" or "*selfish*," but it is the law, which requires that the purpose or use shall be "a charity," and so affirmatively appear before the rules which relate to private trusts shall be suspended and those more liberal ones invoked to aid the questioned grant, donation or devise. If it does not sufficiently appear that a charity was intended, if it is doubtful whether it was not the design of Mr. Russell to erect a monument consecrated to his own memory, then although the *youth* of the world might be, as a secondary consideration, helped to some species of education, for some kind of consideration, there would yet be the absence of the evidence of that intention to glorify God or to help the neighbor which is essential to the "charity" of the law.

It is true that by the "statute of Elizabeth," "education" was recognized as one of the uses properly denominated charitable; but then there existed but limited educational facilities. No dreamer imagined the ex-

istence of the free schools of the American states. The free school of to-day is alike the greatest educator, the first protector of liberty, and the noblest charity of ancient or modern times. All will concede that it is the first of charities. Conceding this, it by no means follows that all institutions for the education of "youth" are charities. Instances could be multiplied where professorships are founded, all for the education of youth, where neither of those essentials, "the love of God" or "the love of your neighbor," entered near so apparently as the selfish consideration of gloryfying one's self. In the broad light of the free school, one which could be enjoyed only by a favored few and for a special purpose would hardly be deemed in law a charity.

III.

There is no donee capable of taking and administering the fund to the use intended.

In the consideration of this point it is material to dissect the deeds and ascertain who are the characters referred to by Mr. Russell. They are—

1st. "Mr. John S. Horner."

2d. "Youth."

3d. "Russell Institute."

4th. "President of the board of trustees of Russell Institute."

Which of these characters is to be considered the donee to take and administer the fund to be created by the sale of the property conveyed by Mr. Russell? It is not Mr. Horner, for he is the trustee, who has no authority except such as is given by the deeds, viz: to sell the property, collect the money and pay it over to the "president of the board of trustees of Russell Institute." It cannot be "YOUTH," for if that indefinite class, uncertain as to age, sex, color, condition, residence, creed, nativity or number, is to play any part in the role, it must be in the capacity of bene-

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ficiary. It cannot be "Russell Institute," for it is admitted that there was never any such, either as a corporation or institution, to which Mr. Russell could have referred, nor is there anywhere provision made or authority given for bringing into existence such an institute. Neither is it the "President of the board of trustees of Russell Institute," for it is also conceded that no such office existed, and that his is only an imaginary existence and the office a myth. There being, then, no donee capable of taking and administering the fund for the benefit of the *cestui qui trust*, in accordance with the intention and direction of the donor, can a grant, as to a charitable use, be upheld? Let us pursue this question a little further: Is there a donee in its *legal sense*, viz: one to take the legal interest in the fund and apply and dispense it in furtherance of Mr. Russell's charitable purpose?

Mr. Horner *was not*. He was merely a trustee appointed to take the property and convert it into cash, "*for the use and benefit of Russell Institute, of St. Louis, Missouri.*" He had no powers except such as he derived from the deeds. He could not establish the charity, determine its form or its beneficiaries. By every principle of construction, the specification of certain powers is the exclusion of all others. He took and held for the purpose of converting into money within ten years, and to pay the same to the "President of the board of trustees of Russell Institute." He is therefore excluded from the exercise of any other power. No discretion was confided to him.

White vs. Fisk, 12 Conn., 30.

To illustrate: Suppose the proceeds of the property conveyed had been found in his hands by the heirs-at-law of Mr. Russell, and had been, by them, demanded on notice given to him that there was no Russell Institute. Could he have answered—I will found it; I will organize it; I will create a board of trustees. Where would he find his authority for so doing? This discretion was not confided to him by Mr. Russell. It is

manifest he had no such power, and the heirs-at-law could have successfully claimed the fund from him.

Mr. Allen occupies no stronger position than Mr. Horner. The deeds have invested him with no discretion. The money by the deeds was to have been paid to the president of the board of trustees of Russell Institute, and not to Mr. Thomas Allen in his individual capacity. Suppose there had been such an office as the presidency of the board of trustees of Russell Institute, and Mr. Allen had filled it; that he had resigned pending the execution of the trusts confided to Mr. Horner, and another president had been elected; could there be any doubt as to who would be the proper person to whom Mr. Horner should make his payments? Certainly he would have been required to pay to the person filling the office. Individually Mr. Thomas Allen cannot be considered in the determination of the questions involved. It was to the officer and not to the Individual; to the "President of the board of trustees of Russell Institute," and not to Mr. Allen, that this fund was to have been paid. The conveyance was in trust to sell and pay the proceeds to "Thomas Allen, president of the board of trustees of Russell Institute."

In a recent case it was decided by this court that a devise to "Richard V. Wheelan, Bishop of Wheeling," etc., it not being intended he should derive any private advantage from it, was in effect a gift to the office of the "Bishop of Wheeling."

Kain vs. Gibbony, 101 U. S., 362.

It follows, therefore, that the mention of Mr. Thomas Allen, by name, has no legal significance, and in no respect aids to bridge the deficiency of the deeds. It merely leaves it in the discretion of those entitled to the fund to follow it where it can be traced and identified, or to call on Mr. Horner for it. The accidental circumstance that Mr. Horner has placed the funds in hands not entitled to receive or keep them, cannot change the legal relation of the parties to the fund.

Since Mr. Horner could not found "Russell Institute" nor create a "board of trustees" and make Mr. Allen the president of that board, by reason of want of authority, may I ask, did the mere mention of Mr. Allen's name, as the imaginary president of an unreal board, give him more power than was possesed by Mr. Horner? The existence, in fact, of a board of trustees of "Russell Institute," to which Mr. Russell could have referred, would have carried with it an implied power to appoint a president, but the existence of an individual by the name of Thomas Allen can hardly be said to invest in that individual a power to create such a board of trustees. A president of a board is usually the creature of the board, and the board must exist before it can create a president.

If it appears that Mr. John S. Horner is not the donee in its legal sense, can it with any greater reason be said that "Russell Institute" is a donee in its legal sense?

It is important to determine the relative legal status of "Horner," "Russell Institute," and "Youth." If Russell Institute was intended to be the trustee through which the philanthropic designs of Mr. Russell were to be effected, there being none such and no one authorized to establish such, the duty and power of so doing devolves on the chancellor to furnish the society, corporate or voluntary, to carry out the designs if this right and power exist anywhere. If "Russell Institute" be regarded as the *cestui qui trust*, or the beneficiary, there being none to receive the bounty, the trust created for the use of such fails.

It is well established that those capacities must be filled. As charitable uses, like all other uses, comprise a trust as well as a use, it is obvious that they are liable to two classes of defects, one affecting the trust and the other the use. To constitute a valid use there must be in all cases—1st, a trustee legally competent to take and hold the property; and 2d, a use for some purpose clearly defined.

Owens vs. Missionary Society, 14 N. Y., 406.

It being conceded that there is no "Russell Institute" to fill the place of *donee*, and neither Horner nor Allen nor "Youth" being eligible to this office, it must be concluded that there is no donee in fact; neither has the erection of one been provided for.

There must be a donee capable of administering the fund in accordance with the intention of the donor.

Beekman vs. Bonsor, 23 N. Y., 299.

It was conceded in the cases of

Vidal vs. Girard's Executors, 2d Howard, 127,

Chambers vs. City of St. Louis, 29th Mo., 543,

That it was necessary that there should be a trustee competent to take and administer the fund; and the great contention was whether there was such.

In Vidal vs. Girard's Executors, *supra*, the supreme court of the United States held: "The city of Philadelphia has power, under its charter, to take real and personal estate by deed and also by devise. * * * And it may also take and hold property in trust in the same manner and to the same extent that a private person may do."

In Chambers vs. City of St. Louis, *supra*, the supreme court of Missouri, resting upon the authority of Vidal vs. Girard's Executors, held that the city of St. Louis was a trustee competent to take and administer the trust fund.

The charitable devises of Girard and Mullanphy were upheld avowedly upon the ground that those two cities were donees competent to take and administer the bequests in accordance with the charitable intention of the donors.

If either of the courts before whom those cases were pending had been of opinion that the competency, or existence of a competent trustee

or donee, was an immaterial consideration, the vast labor expended on that question would have been avoided. Both courts and the counsel elaborated the question, because it was material, and necessary to be decided affirmatively to uphold the devises, although they were to charitable uses,

Now, if it be admitted that the court of chancery in England, "in its anxiety to support uses deemed specially meritorious, had, independently of the statute of *Elizabeth*, somewhat relaxed the rigid rule of the common law in regard to the certainty required in the specification of the use. there is still no evidence that it ever assumed to dispense with the rule which required that there should in all cases be a competent trustee of the fund."

Owens vs. Missionary Society, *supra*.

In this case, Justice Selden, speaking for the court, said. "I am constrained, therefore, to hold that a devise to an unincorporated missionary society is void."

The statute of 43d Elizabeth cannot be referred to as in any way giving aid to the court in upholding the trust and use here attempted to be created. It is now fairly determined that it made nothing legal which was illegal, and nothing valid which was invalid before its passage. Indeed, it is obsolete. Its purposes were remedial. It is not suited to our condition, society or institutions.

Williams vs. Williams, 4 Seld., 546.

Incorporated Society vs. Richards, Drury & Warren, 301.

Ould vs. Washington Hospital, 5 Otto, 303.

Chambers vs. City of St. Louis, 29 Mo., 543.

If it be the law that an unincorporated voluntary association, existing for benevolent or charitable purposes, is a sufficient trustee to take hold and administer the charity, the case at bar is not helped, for it is admitted

there was not, has not been, and is now none such, and no discretion for its erection anywhere reposed.

To impart validity to these deeds so as to deprive the heirs-at-law of their interest, there must be a donee of the gift, "*by which is meant a donee to take the legal interest in the fund and apply, and dispense it in furtherance of the donor's charitable intent;* when there is none, the necessary legal consequence is that the charity fails altogether."

Beekman vs. Bonsor, 23 N. Y., 299.

Andrew vs. New York Bible Society, 4 Sandf. (N.Y.) 56.

If it be said that Mr. Horner is the trustee and Russell Institute the *cestui qui trust*, the same result is reached by the same process of reasoning. There being no such asssociation, corporate or voluntary, *in esse*, nor the discretion or power vested anywhere to bring it into existence, there is a failure for want of beneficiaries. It is equivalent to a trustee *in esse*, that provision be made for bringing one into existence. But there must be one *in esse*, or provision made and the discretion for bringing into existence reposed somewhere.

All cases which have been upheld where there was not a donee to take and administer the charity, have been where a discretion and power was given to some one to bring the trustee or donee into existence, or where the use was so clearly defined as to be capable of being specifically executed by a court of chancery. Notably the cases of

Ould vs. Washington Hospital, 5 Otto, 303.

Inglis vs. Sailors Snug Harbor.

This defect cannot be remedied by the court of chancery in this country. This court has not the power to supply that which Mr. Russell left undone. Here the courts may exercise only judicial powers. The English doctrine *cy-pres* is a doctrine of prerogative. Under the influence of

that principle many things were done by the chancellors of England, in their capacity of Keeper of the King's Conscience, which would not be done here. The authority of such cases is repelled because that principle has not been adopted into our system of jurisprudence. It has been severely criticised by English chancellors.

White vs. Fisk et al., 22 Conn., pp. 53-4, and cases there cited.

Lepage vs. McNamara, 5 Iowa, 124.

Andrew vs. New York Bible Society, 4 Sandf. (N.Y.), 56.

Williams vs. Williams, 4 Selden, (N. Y.) 527.

Fontaine vs. Ravenal, 17 Howard, 382.

One reading the trust deeds would conclude at once that at the date of the execution of the deeds, Mr. Russell supposed that "Russell Institute" was an existing thing, or that he contemplated its immediate establishment. This conclusion is not overthrown by the recital of the consideration that it was for the purpose of founding an institution for the education of *youth*. In every other place where it could be appropriately mentioned, he speaks of "Russell Institute," "the board of trustees," "the president of the board of trustees of said Russell Institute."

He also directs the money, which must have been expected to be coming in at once, to be paid to the "president of the board of trustees." If he had not regarded this Institute as an existing one, or that it would exist before the end of one year, there would have been provision made to pay to the board of trustees *when organized*. If Mr. Russell knew there was no "Russell Institute," no "board of trustees," and no "president thereof," or had not expected to erect or establish it, and had been in possession of his faculties, he would have defined what "Russell Institute" *was to be*. But regarding it as an existing society, with defined purposes and a fixed organization or expecting himself to attend thereto, he deemed this not essential, and it would not have been essential had such an insti-

tution existed, or been thereafter created by him or under his appointment, with proper organization and known objects, for the usual course and purposes of the association would be presumed to have been acceptable to the donor.

Had Mr. Russell, after the execution of these deeds, caused the organization of "Russell Institute," or invested any one with the discretion and power to do so, and it had been exercised, this fund would not be a waif. But he did not, either from misapprehension or otherwise, which makes no difference.

It has been held by this court in express terms that there must be a donee capable of taking and administering the trust, and in its absence the bequest is void, and the property vests in the next of kin.

Trustees Baptist Ass'n vs. Hart's Ex's, 4 Wheaton, 1.

"The same conclusion may be derived from the consideration that there is no donee of the gift; *by which is meant a donee to take the legal interest in the fund, and apply and dispense it in furtherance of the testator's charitable intent. As there is no person or body corporate appointed to take the bequest, the necessary legal consequence is that it fails altogether.*"

Beekman vs. Bonsor, 23 N. Y., 306.

There is an exhaustive note to the case of Dasheil vs. Attorney General, 9th American Decisions, 573, in which it is said :

"The validity of bequests to charitable uses, where such uses are recognized, will depend, in a great measure, on two considerations : first, *whether there is a competent person or body to assume the trust*, and, secondly, *whether there are ascertainable beneficiaries*, in whose favor and for whose use the trust may be executed. In Perry on Trusts, Vol. 2, Sec. 729, it is said that a bequest for a charity generally, or to such persons in trust as shall be named thereafter, and none are named ; or if a trust is created in a will, for a school to be thereafter named ; or to the poor gen-

erally; or to charity generally, with no trustees appointed; or if a gift is made *for an object which has no existence;* or given to an uncertain charity; or to a particular charity by a description so uncertain that it is wholly uncertain what charity is intended; in these cases courts in America could not interfere to establish the charities, appoint trustees, or decree a scheme by which the funds should be expended. Some prerogative power is necessary to give effect to such inchoate, imperfect or illegal bequests. Courts in England do not profess to administer them in their judicial capacity, and the courts in America, with a few exceptions, have declined to act in such cases."

"Whilst a gift to a corporation to be formed, the donor looking to a particular source from which it is to spring, may be upheld in some circumstances, yet a gift to a corporation *that may not be incorporated* within the time limited for the vesting of estates will fail."

"If a testator creates a trust for a particular charitable purpose, as for a school * * * * *and points out all the details*, so that there is certainty in the purposes and objects of the charity, *and appoints no trustees*, or if the trustees fail for any reason, courts will appoint other trustees, *for such is the plain intent of the donor.* * * * But if a testator makes a vague and indefinite gift to charity and names no trustee (or, which is the equivalent, one having no existence) and gives no power to the court to appoint, there is no power in the American courts to administer such an inchoate and imperfect gift."

Perry on Trusts, Vol. 2, Sec. 731.

"The courts in America have generally declined, in the absence of legislative authority, to administer these indefinite gifts to charity or religion, or education, or public utility unless there was a trustee appointed by the testator to exercise his discretion in applying the gift to particular objects or persons."

Ib., Ib., Sec. 719.

The case of Ould vs. Washington Hospital for Foundlings, supra, has been referred to as an authority against the claim of appellants. It should not be so considered. It is, on the contrary, a strong case in support of the bill here. With a proper regard for controlling general principles each case is to be determined by its own surrounding circumstances. In that case as well as in case of Inglis vs. Trustees Sailors' Snug Harbor, cited to uphold the devise then under consideration, provision was made for a donee which could administer the trust to the use of the defined class who were to be the recipients of the testator's bounty. In the Ould case the executors were to hold the property and convey it to such institution as might thereafter "*be incorporated by an act of Congress for such hospital*," provided that such corporation should meet the approval of the said trustees, to whom full discretion is given in this behalf.

In Inglis vs. Trustees of the Sailors' Snug Harbor, the testator gave the property to the Chancellor of the state of New York and others, in trust, "*to establish* and maintain an asylum for aged, decrepid and worn-out sailors," to be called "Sailors' Snug Harbor." And if the trustees could not execute the will they were to procure from the legislature an act of incorporation giving them the requisite authority. In each of these cases there was the authority and direction from the testator providing for a suitable authority to administer the trust and in strict pursuance of the directions given, and in a short time it was brought into existence and was an existing thing, and in the execution of trusts, when the heirs at law claimed the property. Provision was in each case made for the donee. How unlike the case at bar. Mr. Russell made no provision, such as was made in these cases; he gave no discretion to anyone, and made no intimation as to what "Russell Institute" was intended. In the *Ould* case it was to be a corporation chartered by congress and approved by the trustess. In the "Sailors' Snug Harbor" the trustees were to "establish" it, and if necessary to procure an act of the legislature to aid them. Nothing was there left uncertain or indefinite, here all is left to conjecture.

In their brief in the court below, at page 15, counsel for appellees say:

"It is true that no express authority is given to any persons specifically to organize the corporation contemplated, and it is true, as alleged, that no organization has yet been effected. But no such authority from the grantor was needed to perfect a *corporation* under the laws of Missouri for the purpose in question. Under the terms of the deeds *any person who might see fit*, can organize the corporation *provided* for, and any president of the board of trustees could receive the trust fund for the use and benefit of the institution, as well as Thomas Allen."

If persisted in here this must be held a fatal concession. Can it be possible that the courts of equity in this country will say that when a trust is created to be exercised by an institution of learning, and a bounty is to be dispensed, that any stranger by bringing together an organization *of the name* used may seize and administer the fund provided, independent of any consideration as to whether it was the institution intended or not?

"Any person who might see fit can organize the corporation provided for." In the sense that one such organization would have as much right as any other, because none would have any right, that is true. For who can say what "Russell Institute" was referred to by Mr. Russell?

Why should counsel have said any one may organize the "*corporation?*" There is no authority in the deeds of Mr. Russell for saying he referred to an *incorporated* rather than a mere voluntary association. We are left entirely to conjecture as to Mr. Russell's purposes. And in this connection the deed set out with this paper bears evidence of what may account for this uncertainty. In explanation of his signing the deed by "his mark," it is stated that he is suffering from paralysis. The bill also alleges, which is confessed, that at the time of the execution of the deeds he "was infirm in body and weak in mind." From a consideration of all the facts the conclusion must follow that if Mr. Russell did possess his facul-

ties he either believed that there was a "Russell Institute" or he contemplated its establishment. It is not a fair inference from the facts which are conceded that anything called "Russell Institute," by whomsoever organized, was intended by him to be the dispenser of his bounty. If such had been his purpose he should have plainly said so, for such an inference does violence to common experience.

Whether Mr. Russell believed there was a "Russell Institute" at St. Louis county when there was not; whether he designed to found a "Russell Institute" and did not, or whether he intended to confide that power to some other person or authority, and died without consummating that purpose, can make no difference; the same legal consequence follows, that since there was not, is not, and cannot be, any such institute as a court can say judicially was referred to by him, the charity must fail.

Fountain vs. Ravenel, 17th Howard, 382.

IV. and V.

It fails because the use is not so far defined as to be capable of being specifically executed by a Court of Chancery, and because of the want of ascertained beneficiaries.

The fourth and fifth reasons for its failure may be considered together.

A case must be determined by general principles of law applied rationally to its peculiar circumstances. Whether there is a use specified in the Russell deeds with sufficient certainty, cannot be determined by a reference to the Mulanphy, Girard or Ould case. All the circumstances are different. In each of those cases the requisites existed so that "uncertainty could be made certain." For instance, in the Ould case, 5th Otto, provision was made that the trustee should turn over the fund for the benefit of the foundlings when a corporation was created, &c. It was created as was provided. In the other cases the donees existed which could take the funds, determine the beneficiaries, &c. But whether there is suf-

ficient certainty as to the use here, is to be determined with the consideration in mind that there exists no *real* or artificial person in whom the slightest discretion has vested. The cases which have been sustained, when assailed, as sufficiently certain in the purposes of the charity, might well have been, upon the principle, "*that is certain which may be made certain*," and because each afforded an easy method and a competent authority to do so.

The most notable cases in which the courts have sustained gifts to charitable uses, where the validity was assailed for want of certainty in the purposes, are :

Vidal vs. Girard's Executors.

Chambers vs. City of St. Louis.

Ould vs. Washington Hospital.

I think neither of these cases can be referred to as sustaining the validity of the charity claimed in the case at bar, because they are so unlike this in all the essential facts.

In each of these cases there was—

1st. A trustee competent to take and administer the fund.

2nd. A charitable use so far defined as to be capable of being specifically executed by a court of chancery.

3d. Ascertained beneficiaries.

For cases where the trust has been held invalid because of uncertainty of the charitable use, I would refer the court to

White vs. Fisk *et al.*, 22 Conn., 50–54.

Trustees Baptist Association, vs Hart's Ex., 4 Wheaton, 1.

Grime's Executors vs. Harmon, 35 Ind., 198.

Lepage vs. McNamara, 5 Iowa, 124.

Wheeler vs. Smith, 9 How., 55.

Owens vs. Missionary Society, 14 N. Y., 387.

Williams vs. Williams, 4 Selden, (N. Y.). 527.

Fontaine vs. Ravenel, 17 How., 382.

Wilderman vs. Baltimore, 8 Md., 551.

Dashiel vs. Att'y Gen'l, 5 Har. & J., (Md.) 392.

Some of the cases cited give more importance to the statute of 43d Elizabeth than is due. It is not of the slightest consequence whether it be treated as in force or not. It only provided for the enforcement of valid charitable gifts.

The case of Chambers vs. the City of St. Louis is a case of especial interest, because it is a Missouri case.

Byron Mulanphy, by a will made in 1849, gave to the City of St. Louis one-third of his estate, in trust, to furnish relief for "poor emigrants and travelers coming to St. Louis, on their way, *bona fide*, to settle in the West."

It was objected to the validity of the trust,

1st. That the City of St. Louis could not, in its corporate capacity, take and hold and administer the trust.

2d. That, even if the city was a donee competent to hold and administer the trust, the object of the trust was so vague, uncertain and indefinite that it was, for that reason, void.

The Supreme Court of Missouri held,

1st. That the City of St. Louis was a donee competent to hold and administer the trust, and that it was not a sufficient objection that St. Louis was a municipal corporation.

2d. That in case of a charitable use, a trust will be enforced which would not be enforced if it were a private trust between individuals, *and there being a competent donee*, the trust was valid.

The language of the court is this:

"The case, as we view it, shows there is a valid devise to a *trustee capable of taking the subject of the devise, and competent to undertake and execute the trust with which the devise is clothed.* As the general object of the charity *was specific and certain, and not contrary to any positive rule of law, with a competent trustee to execute the charity designated*, we do not see on what ground the objection can rest." "This charity," says the court, "should be carried into execution and be sustained by the authority of Vidal et al. vs. Girard's Executors."

In the Girard College case referred to, Mr. Girard gave a large amount of property to the city of Philadelphia to establish and maintain a college for orphan boys, and gave detailed directions as to its place, plan of erection and government. There were three objections made as to the validity of the trust—

1st. There was no competent donee, because a municipal corporation could not hold and administer the trust.

2d. The trust was too uncertain and indefinite.

3d. That it was unchristian, because it provided that there should be no religious teaching, and ministers of all denominations were to be excluded from even visiting.

The supreme court of the United States held—

1st. That the city of Philadelphia, though a municipal corporation, was capable of holding and administering the trust.

2d. As to the objection that the trust was too uncertain and in-

definite, the case was to be distinguished from the case of the Baptist Association vs. Hart's Executors, and Wheeler et al. vs. Smith.

Justice Story, in giving the opinion of the court, said:

"The donee in that case (Baptist Association case) was an unincorporated association, which had no legal capacity to take and hold the donation in succession for the purpose of the trust, *and the beneficiaries were also uncertain and indefinite.* Both circumstances therefore concurred; a donee incapable of taking, and beneficiaries uncertain and indefinite."

Applying the legal principle settled by these cases, and they are the most favorable to claims of appellee, it seems clear that the trust attempted to be created by the Russell deeds cannot be sustained. It is manifest from the language of the court in the Mulanphy case that if there had been a devise to an imaginary association or corporation, instead of being made to the city of St. Louis, the court, to be consistent, must have held the trust to be invalid.

The same may be said of the Girard College case. The trust was sustained because the city of Philadelphia was capable of taking, holding and administering the trust, and the trust was sufficiently certain to be administered by this competent trustee.

Upon the authority of these cases, the law is, that if there is a competent donee to take, hold and administer the trust, it may be sustained to uphold a charitable use, where, if it were a private trust, it would fail for want of certainty. So much, and only so much, advantage is given to a charitable object over a private trust; but when in the case of a charitable use both defects exist, both concur, viz: a donee incapable of taking, holding and administering the trust, or, as in the case at bar, no donee whatever, and such uncertainty as would be fatal to a private trust, then the trust must fail.

Such is the conclusion upon a consideration of the authorities upon which respondent must rely to sustain the demurrer to the bill.

The attention of the court is invited to some of the authorities which are cited to sustain the bill. From them the following principles are deducible:

1st. That a gift to charity is maintainable if made to a competent trustee, and the charity is so defined and certain that it can be executed as made by the donor by a judicial decree, although it may, for want of certainty, be void, according to the general rules of law as applicable to private trusts.

2d. That in other respects the rules of law applicacle to charitable uses are the same that appertain to trusts in general.

3d. That the "*cy-pres*" power, which constitutes the peculiar feature of the English system, and is executed in determining gifts to charity where the donor has failed to define them, and in framing schemes of approximation near to the donor's design, is unsuited to our institutions, and has no existence in the jurisdiction of the courts of this country. It is a doctrine of prerogative.

4th. The courts of this country can exercise none but a judicial power.

Perry on Trusts, §§ 713, 719 and note, § 731 and note.

5th. Where there is no donee capable of taking the trust, and at the same time there is such a degree of uncertainty that if it were a private trust, affecting individuals only, it could not be enforced, in such case the trust fails and the fund goes to the heirs of the donor.

The case of the Baptist Association vs. Hart's Executors is quite like the case under consideration. Silas Hart, by his will, made a bequest "*to the Baptist Association that for ordinary meets at Philadelphia annually, to be a fund perpetually for the education of youth of the Baptist denomination who shall appear promising for the ministry, giving preference to descendants of my father's family.*"

The supreme court of the United States held:

1st. That the Baptist Association, which was an unincorporated society, could not hold the property.

2d. That there were no persons designated with sufficient certainty to justify the court in decreeing the property to them.

Chief Justice Marshall, in giving the opinion of the court says:

"This Baptist Association is described with sufficient accuracy to be clearly understood, but not being incorporated is incapable of taking this trust. The bequest is void, and the property vests in the next of kin."

And speaking of the beneficiaries, he says:

"Those for whose benefit the legacy was intended are to be designated and selected by the trustees. It could not be intended for all the youth of the Baptist denomination who were designed for the ministry, nor for the descendants of his father's family unless they should appear promising. These trustees (the Baptist Association) being incapable of executing this trust, or even of taking it on themselves, the selection can never be made, nor the persons designated who might take beneficially."

In the case of *Beekman vs. Bonsor*, Mr. William Barthrop, of Albany, had, by his last will, declared that "he would wish a public dispensary, as in New York, on a similar plan, for indigent persons, both sick and lame, to be attended by a physician elected to the establishment, at their own homes, and daily at the establishment, my executors to consult with judicious men in Albany respecting the same, and funds ample to carry on the building and yearly expenses."

The Court say: "All that we can ascertain from the language of the testator is that he had in his mind a vague and shadowy conception of a dispensary similar to those in New York; that he devoted a blank sum of money to *found and perpetuate* an institution of charity, which, in his

mind, was blank as to everything except the *general purpose* which he designed to promote. It needs no authority to prove that such a provision is void. The same conclusion may be drawn from the consideration that there is no donee of the gift, by which is meant a donee to take the legal interest in the fund, and apply and dispense it in furtherance of the charitable intent, as there is no person or corporation appointed to take the bequest, the necessary legal consequence is that it fails altogether."

In the case of *White vs. Fisk et al., supra*, the contention was on the following provision of the will:

"Any surplus income that may remain, to the extent of one thousand dollars per annum, I direct to be expended by my said trustees, for the support of indigent, pious young men preparing for the ministry, in New Haven, Conn."

The court held the devise void, and that the fund should go to the next of kin. The following quotations from the opinion of the court are appropriate to the case at bar:

"And while we acknowledge the benevolent and charitable intention of the testator in this gift, and the laudable purpose he conceived, we cannot see how, confining ourselves within what we believe to be our legitimate powers of interpretation and judgment, we can carry that intention into effect." "This legacy is not given to any college or institution, nor to any association of persons, corporate or voluntary; nor is any such alluded to by which the charity can be dispensed; but only as a legal interest to trustees. * * * * The difficulty of carrying this provision into effect is as great as if no trustee had been appointed, for no rule of determination, selection or apportionment is furnished by the will, and no positive or discretionary power of determination is bestowed."

"It has been suggested that the power of selecting the beneficiaries under this bequest is in the trustees. We do not so understand it. Their only power is to expend the money—to pay it out to the persons entitled,

&c. Such a power cannot legally be inferred, &c., and to do so would be for us to substitute a very liberal conjecture in the place of legitimate interpretation of language and legal judgment."

"If this bequest, for the purpose indicated in this will, had been made to a college or other body, which had, or might have, a supervision or interest in the general object of the charity, and rules for its management, it would have presented a very different case, but as it is, we think the provisions of this will in this matter have been left by the testator quite too loose and indefinite for judicial action."

The statutes of descent and distribution have established rules for the distribution of estates, founded on the ordinary principles and impulses of natural affection and equity, and in the absence of other evidence, these may be followed as the last exponents of intention. One may change these laws in his own case, if he will, but to do so effectively he must not only observe prescribed formalities with exactness, but he must speak in a manner leaving no reasonable doubt of his purpose, and if he does not do this, the general and prescribed laws should be permitted to have their just and equitable effect.

"There is a class of cases, the authority of which we recognize, where the individual beneficiaries under a will, *but included in a definite class*, are left uncertain, and yet the bequest for their benefit has been sustained. But these are cases where the gift has been to some corporate or voluntary association whose duty and business it becomes to dispense the charity, or where the power is very certainly conferred by the will upon the executor or trustee to discriminate and select or to apportion the application of the funds."

In the case of Wheeler vs. Smith, 9 Howard, 55, the supreme court of the United States, for indefiniteness of the use, held the trust invalid, and directed the fund to be distributed to the next of kin, although there were trustees appointed by the will who were invested with a large dis-

cretion by the testator. There the property was given to his executors "in trust for such purposes as they consider promises to be most beneficial to the town and trade of Alexandria." And in a subsequent clause the testator says: "Now, I leave the same entirely to their disposition of it," &c. The court, after citing numerous authorities, held: "From the principles laid down in the above cases it is clear that the devise under consideration cannot be sustained. A trust is vested in the executors, but the beneficiaries are uncertain *and the mode of applying the bounty indefinite. How can a court of equity administer this trust?*"

Owens vs. the Missionary Society, 14 N. Y., 380, is a well considered case, and it seems conclusive of the questions here.

Holding the devises to a charitable use to be void in that case the court say:

"Courts of equity should enforce the execution of trusts created for public and charitable purposes only in cases where a fund is given to a trustee competent to take, and when the charitable use is so far defined as to be capable of being specifically executed by the authority of a court of chancery; and there is little in the history of charitable uses in England to encourage the courts of this country in violating the ordinary rules of law in their efforts to sustain a particular class of trusts."

The case of Williams vs. Williams, 4th Seld., 527, arose upon a bequest "to the trustees of the Presbyterian church of Huntington and their successors," &c. This was a corporation organized under the general statutes of New York, and on the question of certainty the court use this language: "In that class of cases, therefore, that the gift is so indefinite that it can not be executed by the court, * * * the claim of the representatives of the donor must prevail over the charity. The reason is, that we have no magistrate clothed with the prerogatives of the crown, and our courts of justice are entrusted only with judicial authority. It is unnecessary to decide in this case whether we could proceed upon the

notion of approximation, &c. My own opinion is, that the distribution of powers among the great departments of the government, which is a fundamental doctrine in the American system, would prohibit the courts from exercising a jurisdiction so purely discretionary."

Fontaine vs. Ravenel, 17th Howard, 382, is a case analogous in principle to the one in hand.

In that case the executors of the will were invested with a discretion to distribute a certain estate between charitable institutions of Pennsylvania and South Carolina after the death of Mrs. Kohm. They died without having executed the power of appointment. Concerning this condition, the court say:

"There must be some creative energy to give embodiment to an intention which was never perfected. Northing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but behind that is a more formidable objection. There is no expressed will ot the testator. He intended to speak through his executors or the the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken. Can any power now speak for him except the *parens patriæ?*"

The court then say that:

"If it is intended to say that the chancellor, in affixing the sign manual, or where he acts under the *cy-pres* power, is in the discharge of his ordinary chancery powers, it does not command our assent." "That power, exercised by the English court of chancery, in enforcing donations to charitable uses which would not be valid if made to other uses, is not a part of its jurisdiction as a court of equity, but a prerogative power. This power does not exist in the federal courts."

Tested by these authorities, and assuming for the purposes of the argument that the use is within the law of charities, is there a trust created by the deeds for a charitable use so definite as to be capable of specific

execution by a court of chancery? If there was a discretion given anywhere by Mr. Russell, so great certainty might not be required as is under the circumstances of this case.

If "Russell Institute" had been in existence and capable of taking and executing the trust, nothing beyond its designation as a donee would have been necessary. The details of the administration would have been left to its discretion. Such not having been the case, there needs to be that certainty in the purposes of the donor as would be necessary in private trusts.

Nowhere are we given any idea of what "Russell Institute" was to be except we gather it from the recital of the consideration of the deeds. Without that recital, "Russell Institute" might as well be asserted to be for one purpose as another. It is only named. The following is the language which must make the use certain, if any:

"For and in consideration of one dollar in hand paid, * * * and for divers other good and valuable considerations, * * * but chiefly *for the purpose of founding an institution for the education of youth in St. Louis County, Missouri.*"

Is this the "Russell Institute" subsequently referred to in the deeds? Do the words, "in St. Louis County, Missouri," refer to the youth in that county or the place where the institution is to be located? Do the directions as to the payment of the funds apply to a president of the institution to be founded, or to one supposed to be in existence? By whom is this institution to be founded? Neither Horner nor Allen are authorized. The conveyance for that purpose does not found it. It is not created by the deeds. The board of trustees do not spring, full-fledged, from the terms of the deeds. Counsel for appellee by their argument in the court below, say, "any one can found it." But it is conceded no one ever did found it, and it may be, no one ever will, and then what is to become of the fund? Judging of the future by the experience of the past quarter of a century, Mr. Allen will keep it, if the decree of the court below is affirmed.

Then, there being no such institute, and no discretionary power given to any one to establish it, do the deeds declare the use so specifically that a court of chancery can establish an institute and christen it the Russell Institute? If your Honors conclude to do so, I presume it will be because you can, from the deeds, determine what Mr. Russell's design was. You may not have recourse to the *cy-pres* doctrine, for the authorities to which the court has been referred say that it is a doctrine of prerogative, it must be exercised only by the personal representative of the sovereign, having the right of the "sign manual."

If we cannot determine the donor's intention, how are we to form a scheme of approximation to it? Any scheme pretending to be one of approximation would be falsely named. We cannot form a scheme of approximation to something we know not of. A scheme of approximation can only be formulated when we have given with definiteness the thing to which we would approximate. And when we have the intention given with certainty, approximation is not allowable; the intention must govern.

We have given here a name, "Russell Institute." Your Honors need not approximate that; it is given and needs no approximation.

A court of chancery cannot formulate a scheme out of chaos and call it one of approximation to the intention of the donor. Therefore, instead of being avoided by our courts as inapplicable to our institutions, *cy-pres* as a principle of administration should have been denounced as an excrescence upon the law of charitable uses.

If the court will not invoke the *cy-pres* doctrine, and it being conceded there is no "Russell Institute," and no authority is given to any one to found it and determine its form, it follows—

1st. That Mr. Thomas Allen must continue to hold this fund; or

2d. That this court must create the donee; or

3d. That the heirs-at-law of William Russell must take this fund.

Mr. Allen will not be permitted to keep this large sum of money for the next quarter of a century as he has for the past, and the court must therefore determine what kind of donee it will create to prevent the failure of this charity.

The consideration named in the deeds may be used by the court to begin "Russell Institute" by locating it at St. Louis, and saying it is for tha "Education of Youth."

What is to be the character of the Russell Institute? Shall it be a free school, or shall a tuition fee be exacted? Shall it be a classical, scientific, mechanical, religious or a military school? Was it according to the design of Mr. Russell to be open for the poor only, or for the rich and poor alike? Is the term "Youth" to be interpreted as meaning boys only, or shall it be held to include the youth of both sexes? Shall the "Russell Institute" be for the benefit of the youth of the city of St. Louis only, or for the benefit of the youth of the city, county, state and nation? Shall the board of trustees be christian or infidel? And if christian, shall it be denominational? Shall it be for the white, or for white, black and copper-colored youth?

The character of an institution would depend almost entirely upon the character, opinions and prejudices of those who compose the board of trustees. If the trustees were Roman Catholics, or other sectarians, how different a thing it would be from an institution under such a management as controls our public schools. Who shall be provided to determine whom of the youth shall be admitted to the benefits and privileges of this institute?

Upon none of these points has Mr. Russell given any direction, nor has he provided for the exercise of a discretion in regard thereto by any person, association or corporation *in esse*, or to be created; none of the methods by which "uncertainty may be made certain" have been provided.

In Grimes vs. Harmon, 35 Ind., 198, it was held that, since the beneficiaries named were "children of the colored race, both male and female,"

and no authority given to discriminate, the charity must fail. The class in the case at bar is infinitely more indefinite.

The law of charitable uses, as administered in England, is peculiar, but even there, under the powers derived from the general jurisdiction of the court of chancery, the charity under discussion must have failed for want of certainty.

The attention of the court is further invited to the note to Dashiel vs. Attorney General, 9th American Cases, 572, in which the editor collects and comments upon all the leading American cases upon the subject of charitable uses. Of the principal case he says:

"This is one of the leading cases of our judicial history, where the important question of charitable uses is discussed, and is frequently cited as containing sound principles regarding the uncertainty in a devise which will prevent its operation as a charitable use. It is thus noticed by the courts in New York and Indiana with approval."

Levy vs. Levy, 33 New York, 97.

Grimes vs. Harmon, 35 Ind., 198.

"CERTAINTY IS THE OBJECT. The principal inquiry in these cases is, as to the certainty of the object of the devise; for, even if lawful in the first place, the beneficiaries may be so indefinite and the objects so uncertain, that no court invested with the ordinary chancery powers which our courts possess could enforce the trust."

In Lepage vs. McNamara, 5th Iowa, 124, it was held: "There is in general the same necessity for a *cestui qui trust*, capable of taking the beneficial interest, and so defined and pointed out as that there shall be no uncertainty, as there is for a properly defined grantee in a deed."

In Galego vs. Attorney General, 3 Leigh., 487, the devises were held to be void, because uncertain as to the beneficiaries, though to charitable uses.

"In Wilderman vs. City of Baltimore, 8 Md., 551, it was held, that a devise to the City of Baltimore, in trust for the relief of the indigent poor persons who may from time to time reside in the twelfth ward of the city, was void, as being too vague and indefinite."

"A bequest to be used in the education of a *specified class of the children* of a particular county and state is sufficiently certain as to the beneficiaries of such trust or devise."

Craig vs. Secrist, 54 Ind.. 419.

In Grimes vs. Harmon, 35 Ind., 198, it is said: "That if certain and ascertainable trustees are appointed, with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to a charitable object, the court will, through the trustees, execute the charity. But where, as in this case, the beneficiaries are described as the children, both male and female, of the colored race in the United States, it is impracticable to ascertain the beneficiaries, * * * when in such case the trustees have no discretionary power to select the beneficiaries from the class named, the gift is void, for vagueness and uncertainty."

"The best general rule that can be laid down in these cases is, that when the beneficiaries are to be determined by no proper or certain standard, where the determination must be arbitrary and uncertain, depending on varying opinion or sentiment, then there is such uncertainty as will render the bequest void. This is well illustrated by two cases in point:

Bridges vs. Pleasants, 4 Seld., Eq., 26.

White vs. Fisk, 22 Conn., 31.

"In the former case a bequest was to be applied to foreign missions and to the 'poor saints.' Ruffin, C. J., held it void on the ground of uncertainty, saying: 'What kind of foreign missions, whether diplomatic or religious, or if the latter, of what sect, or to what country, no man can

say. The gift to the 'poor saints' is equally indefinite. If the testator had told us who were meant by him by that description, the persons thus meant should have the benefit of the bequests. But it is impossible at this day and in this country to say that this or that man is a saint or even a christian; much less can a bequest be supported *for all poor saints indefinitely.*' "

In White vs. Fisk, *supra*, the court asks: "And who are these individuals? They are the pious young men preparing for the ministry in New Haven. The difficulty of carrying this provision into effect is as great as if no trustee had been appointed; for no rule of determination, selection or appointment is furnished by the will, and no positive or discretionary power of determination bestowed. Who, then, are entitled to this bequest? What is meant by indigent young men? No rule of discrimination is given."

In Morice vs. Bishop of Durham, 9 Ves., 399, it was held that a gift to the bishop, "to be disposed of to such objects of benevolence and liberality as he should most approve of," was void for its vagueness and generality, inasmuch as no person or persons in particular could claim the benefit of the gift or compel the bishop to bestow the charity upon any person, while it was yet clear that the bishop could not keep it himself." With how much greater force would this reasoning apply to the case at bar; for here is given neither a bishop to exercise the power of election, nor is there a beneficiary to claim the gift.

The research which has been bestowed upon the questions here involved, by those so much abler than myself, and the learning which has been brought to bear upon the consideration of like questions and in proper form, has become of the records of this court, forbid that I should hope to add anything thereto by further argument. Therefore, with the single further suggestion, that the existence of any one of the specific objections

made to the sufficiency of the particular grant as to a charitable use, independent of each and all of the others, is fatal to the claim of appellee and the decree of the court below, this case is respectfully submitted.

WILLIAM BROWN,

Solicitor for Appellants.

OFFICE SUPREME COURT U. S.
FILED
OCT 19 1882
JAMES H. McKENNEY, CLK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881.

JAMES D. RUSSELL *et al.*,
Appellants,
vs.
THOMAS ALLEN, *et al.*,
Appellee.

September Term, 1878.

BRIEF OF DEFENDANTS.

THOROUGHMAN AND
W. R. DONALDSON,
Solicitors for Defendant Allen.

IN THE SUPREME COURT

OF THE UNITED STATES.

JAMES D. RUSSELL ET AL.,
Appellants,

vs.

THOMAS ALLEN, ET AL.,
Appellees.

September Term, 1878.

BRIEF OF DEFENDANTS.

This suit is brought by complainants, as heirs at law of William Russell, deceased, to declare invalid the trust created by four deeds, Exhibits 1, 2, 3 and 4, respectively, dated July 19, 1855, executed and delivered by said Russell in his lifetime to John S. Horner; and to obtain a discovery of amounts received by Thomas Allen from said Horner under the provisions of said deeds, and to establish a trust in favor of said heirs at law in said Allen. Each of the four deeds refers to the other three; and the following is a copy of one of them (Exhibit 4), omitting descriptions, etc.:

THIS DEED, made and entered into the nineteenth day of July, A: D. 1855 by and between William Russell, of the city of St. Louis and State of Missouri, party of the first part, and John S. Horner, of the town of Helena, Phillips County and State of Arkansas, party of the second part: Witnesseth that the said party of the first part, for and in consideration of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and for divers other good and valuable considerations him hereto moving, but chiefly for the purpose of founding an Institution for the education of youth in St. Louis County, Missouri, hath granted, bargained, and sold and conveyed, and by these presents doth grant, bargain, sell and convey unto the said party of the second part, his executors and administrators or successors in trust, forever, all and singular, the following described lots and lands, * * * * * To have and to hold the said property and premises unto him, the said party of the second part, his executors, administrators and successors, in trust, forever. *In trust*, however, and to and for the following uses and purposes, to wit: The said property is conveyd for the use and benefit of the Russell Institute, of St. Louis, Missouri. And the said party of the second part, his executors, administrators and successors in trust, is hereby empowered and directed absolutely to sell and convey the said real estate hereinbefore described and referred to, or any part thereof, and any right the said party of the first part has, or may have, to any real estate in the said county of Phillips, or in the said State of Arkansas, as soon as conveniently may be, at such prices and on such terms as he may judge fair, reasonable and safe, and to collect and receive the money therefor, and to convey the same by deed to the purchaser or purchasers thereof, and to take security for any part of the purchase money, and when paid to give proper acquittances and discharges therefor, and also to collect and get in the said per-

sonal property and whatever may be due, owing or coming to, said party of the first part, in the said State of Arkansas, and to account for and pay over the money or proceeds of all sales and collections, in cash, as often as once in each year, or oftener if convenient, to Thomas Allen, President of the Board of Trustees of the said Russell Institute, at St. Louis, Missouri, and his receipt therefor shall be a full discharge of the said party of the second part for the amount so paid, and the application thereof, deducting therefrom the reasonable expenses incident to the execution of this trust actually incurred in this behalf by the said party of the second part, including necessary counsel fees and costs to be paid by him in any suit now pending, or which may be hereafter brought in the said State of Arkansas, affecting the trust property, or the rights of the said party of the first part during the continuance of this trust, and all legal taxes and assessments on said property, until sold, which the said party of the second part shall pay, and a commission of five (5) per cent. to the said party of the second part, for his own services and trouble on all moneys actually collected and paid over by him, by virtue hereof, and reserving a sufficient sum on hand during the continuance of this trust, to meet any contingent costs or expenses likely to accrue in relation thereto.

This trust shall be brought to a close, and all the profits and proceeds of the property herein included, subject to the deductions aforesaid, paid over as herein required, as soon as conveniently may be; and if the same is not concluded in ten years from this date, the said trustee, his executors, administrators or successors in trust, shall expose any and all real property, remaining undisposed of at the end of that time, to sale by public auction, for cash, and sell the same, and pay over the proceeds as hereinbefore required, excepting any property which may be at that time involved in suit at law or in chancery; and as to such property, if any, the trust shall be

brought to a close as soon as practicable after the termination of such suits. Of such sale by auction reasonable public notice shall be given by advertisement. And whereas, the said party of the first part hath by three several other deeds, bearing even date herewith, conveyed to the said party of the second part all his property in the counties of Monroe, Desha, Arkansas, Conway and Independence, and Pulaski, in the said State of Arkansas, in like manner and for the like uses and purposes as herein, now it is hereby declared that all of said conveyances, together with the present one, are made to one and the same person, for one and the same use and purpose, and that the same are, and are to be deemed and taken and accounted for as one trust, according to the conditions of the deeds respectively, it having been intended by said deeds to convey all of the remaining property of the said William Russell, in the State of Arkansas, to the said party of the second part, to and for the use and benefit of the said Trustees of the said Russell Institute of St. Louis, Missouri, represented by their President, as aforesaid. And the said party of the second part covenants faithfully to perform the trusts hereby created.

In witness whereof, etc.

The bill alleges that at the time of the execution of these deeds there was not, and has never been up to this date, any educational institution at St. Louis County, Mo., or elsewhere, by whatever name, to which said William Russell could have referred in said declaration of trust, and it is averred that the alleged "Board of Trustees of the Russell Institute" and the alleged "Presidency" of such Board are "fictions."

That at the date of the execution of the deeds said

Russell was infirm in body and weak in mind, and while he manifestly purposed to found an educational institution to be known as the "Russell Institute" at the time of executing the deeds, yet, in his increasing infirmity of body and mind during the short period that intervened between the date of the deeds and his death, he failed to accomplish his philanthropic purpose.

That no authority was delegated by Russell to Horner nor to Allen, nor to any other person or corporation, to organize a "Russell Institute," and it is alleged that no such authority has hitherto been exercised or claimed by any person or corporation, and therefore there was not, at the date of the execution of the deeds, nor is there now, nor has there ever been, any donee capable of receiving and holding and administering the trust fund created by said four deeds.

That the beneficiaries of the trust, so far as can be determined by the terms of these deeds, are uncertain and indefinite, and there not being a donee capable of receiving and holding and administering said trust, and the beneficiaries being uncertain, the trust created by said deeds is invalid, and said trust fund rightfully belongs to complainants and the other heirs-at-law of said Russell.

That said Horner executed to a large extent the trust created by said four deeds by selling lands, and paid the proceeds in money to defendant Allen, and conveyed to defendant Allen, by deed dated February 16, 1874, and by other transfers, all of the remaining lands and property vested in him under the deeds, and that said Allen holds or has converted the same to his own use, and has never applied to any court for aid in the disposition and application of the same as a trust fund.

John S. Horner is not made a party to the bill.

POINTS, AUTHORITIES AND ARGUMENT.

The grounds of invalidity of the trust which are alleged in the bill, are copied above, and we understand them to be the grounds relied on by complainant.

The allegation in the bill that the grantor was infirm in body and mind is not made for the purpose of attacking his mental *capacity* to execute the deeds, or, if such were the purpose, it is clearly insufficient. A man may be both infirm in body and weak in mind, and yet be legally capable of executing a valid conveyance of his property. And the allegation in question falls far short of denying the requisite capacity in the grantor.

The intention of the pleader is evinced by the remainder of the allegation; that "while he (Russell) manifestly purposed to found an educational institution to be known as the "Russell Institute" at the time of executing the deeds, yet, in his increasing infirmity of body and mind during the short period that intervened between the date of the deed and the date of his death, he failed to accomplish his philanthropic purpose."

We have here the admission of requisite mental capacity, but the allegation of a "manifest purpose" on the part of Mr. Russell to *himself* found the educational institution mentioned, which purpose on his part was prevented by his increasing infirmities and his death—not that his bodily or his mental weakness rendered him legally incapable to make the deeds—but prevented him from carrying out the alleged purpose in his lifetime.

We may dismiss, therefore, the question of *capacity* of the donor.

Nor is there any allegation of *fraud* or *mistake* in the execution of the deeds.

The bill does not allege that Mr. Russell believed that there was, at the time of execution of the deeds, such an institution *in existence* as the "Russell Institute," which would be the recipient of his bounty. Such an allegation would have been in contradiction of the express theory of the bill that he designed, at some time before his death, to organize such an institution, but died before doing so—as well as in the face of the terms of the deeds themselves.

We are left, therefore, to consider the force and effect or the language employed in the instruments themselves, unaffected by any other considerations.

We submit at the outset that the only question to be determined upon the demurrer, is whether the facts stated in the bill raise any equity in the complainants in this suit; in other words whether the deeds created a valid trust *in Horner*, for if that be the case, of course no resulting trust can exist in favor of the heirs at law of Russell. The bill does not claim that the property conveyed to Horner, or the proceeds of the same, *revert* to the heirs at law, in consequence of *failure in execution of the trust*—a position wholly untenable—but it proceeds upon the theory that there *never was* any valid trust created in Horner, and that the deeds are void for the reasons alleged.

The first ground assumed by complainants is that there was not, and has never been, any educational institution at St. Louis County, Mo., or elsewhere, to which the

grantor could have referred in the declaration of trust, and that the Board of Trustees of the Russell Institute and the "Presidency" of such Board are "fictions."

The second is that no authority was delegated by the deeds to any person to organize such institution.

The third is that the beneficiaries of the trust are uncertain and indefinite, and there not being a donee capable of receiving and administering the trust, the trust is invalid.

These objections may be considered together, as they are all in substance the same, and the same authorities apply to them all. We find the reports full of adjudications upon the subject, and we refer to but a few which seem to definitely settle the questions here involved.

The only construction which can be placed upon the deeds is that the grantor conveyed the lands to Horner in trust to sell them, and to pay over the net proceeds to the President, representing the Board of Trustees, of a corporation thereafter to be organized, for the purpose of founding an institution for the education of youth in St. Louis County, Mo., to be designated as the "Russell Institute."

It is apparent that the donation was not for the use of a then existing institution, for the deeds declare it is "for the purpose of '*founding*' such institution." These words, whether taken in their ordinary or legal acceptation, can only relate to an institution *not yet established.*

Webster defines the word "found" to signify, "To take the first step or measures in erecting or building up; to furnish the materials for beginning; to begin to raise; to originate."

Worcester's definition is: "To establish; to institute; to originate; as to found a library."

The law dictionaries, Wharton, Tomlin, and others say: "The incorporation of a college or hospital is the very foundation, and he who endows it with land or other property is the founder."

It would be doing violence to language to hold that the grantor referred to an existing institution, when he uses the word "*founding*" of such institution, as indicating the purpose in view.

The fact that the institution intended to be founded is subsequently referred to as the "Russell Institute of St. Louis, Missouri," and Thomas Allen is mentioned as "the President of the Board of Trustees of the said Russell Institute at St. Louis, Missouri," does not indicate that such institute, or such office, existed at the time, but that the educational institution which was contemplated should, when founded or established, bear that name, and Mr. Allen should fill that office, when created.

In this way only can the deeds be construed without denying the purpose of the donor "to furnish the materials for beginning;" "to originate;" "to establish," and "to take the first step in erecting or building up" "an institution for the education of youth," which is avowed as the chief purpose of the conveyances.

Such being the nature of the trust created in Horner by the deeds, we submit that it is free from the objections urged against it.

The education of youth was a charitable use under the express terms of the statute of 43 *Elizabeth*, ch. 4. That statute specifies a number of charities, and among them are "schools of learning" and "free schools." But there are very many objects, not specifically named in that statute, which are held to be within its purview, and it is said that "a charitable use, when neither law nor public policy forbids, may be applied to almost anything that tends to promote the well doing and well being of social man."

Perry on Trusts, sec. 687.

And the Supreme Court of the United States have expressly held that a trust for building, establishing and maintaining a college "for the education of boys and girls," was a charity in a legal sense, and could be enforced in equity by its jurisdiction "without intervention of state legislation," and that "devises having for their object establishments of learning, are considered as given to charitable uses."

Perin *vs.* Carey, *et. al.* 24 How. p. 465.

There can be no doubt that the English statute is in force in both Arkansas and Missouri, both having adopted the common law, "and all statutes and acts of Parliment made prior to the fourth year of the reign of James the First, and which were of a general nature," etc.

Wag. Statutes, p. 886, sec. 1.
Guest *vs.* Farley, 19 Mo. 147.
Gantt's Dig. Ark. statutes, sec. 772.

The later decisions, however, have exploded the doctrine that equity jurisdiction was at all dependent upon that statute.

"That statute was silent as to the creation or inhibition of any new charity, and it neither increased nor diminished the pre-existing jurisdiction in equity touching the subject. It is therefore quite immaterial in the present case whether the statute was or was not a part of the law of Maryland. The controversy must be determined upon the general principles of jurisprudence, and the presence or absence of the statute cannot affect the result,"

Ould *vs.* Washington Hospital, 5 Otto, p. 303.

And also

Vidal *vs.* Philadelphia, 2 How. 128.
Fountain *vs.* Ravenel, 17 How. 379.
Schmidt *vs.* Hess, 60 Mo. 595.
2 Story Eq. Jur., sec. 1187.

The fact that the institution for the education of youth which is named as the beneficiary in the trust, was not, and has not since been, in existence, does not render the trust invalid.

"But a gift may be made to a charity not *in esse* at the time—to come into existence at some uncertain time

in the future, provided there is no gift of the property in the first instance or perpetuity in a prior taker."

Perry on trusts, sec. 736.

"A gift to a charitable purpose, if lawful, is good although no object may be in existence at the time."

Sennet *vs.* Herbert, Law Rep. 7, ch. 237.

"A devise to a corporation to be created by the legislature is good as an executory devise. A distinction is taken between a devise *in presenti* to one incapable, and a devise *in futuro*, to an artificial being to be created and enabled to take."

Ould *vs.* Washington Hospital, 5 Otto, *supra.*
Inglis *vs.* Trustees of Sailors' Snug Harbor, 3 Pet. 99.
Town of Paulet *vs.* Clark, 9 Cranch, 292.
Vidal *vs.* Girard's Executor, 2 How. 197.
Vincennes University *vs.* Indiana, 14 How. 268.
Beatty *vs.* Kurtz, 2 Pet. 566.

"It is immaterial whether the person to take be *in esse* or not, or whether the legatee was, at the time of the bequest, a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects; or whether the corporate designation be mistaken.

"If the intention sufficiently appears in the bequest, it would be valid."

Whitman *vs.* Lex, 17 Serg. and Rawle, p. 88.
2 Story's Eq. Jur., sec's 1165–6 and cases cited.
Adams' Eq., p. 66.
Schmidt *vs.* Hess, 60 Mo. 595.
Angell & A. on Cord., sec. 184.

The objection that the beneficiaries are uncertain and indefinite, and there not being a donee capable of receiving and administering the trust, the trust is invalid, is unfounded.

The beneficiary of the trust is the *corporation* to be thereafter created under the style of the "Russell Institute." The trustee, Horner, is directed to pay the proceeds of sales of land to "Thomas Allen, President of the Board of Trustees of the said Russell Institute, at St. Louis, Missouri," and it is declared that it is "intended by said deeds to convey all the remaining property of the said William Russell in the State of Arkansas to the said party of the second part (Horner), to and for the use and benefit of the said Trustees of the said Russell Institute of St. Louis, Mo., represented by their President aforesaid." There is no authority anywhere for Horner to pay the fund to Thomas Allen individually, but solely in the capacity of President of the Board of Trustees to be organized to receive and apply it,—nor is there any authority for Mr. Allen to apply the gift as an individual to the education of youth, or any other purposes.

This being the case, there is no uncertainty as to the donee, or as to the beneficiaries.

In the case of Ould *vs.* Washington Hospital, 5 Otto, *supra*, the donation was of lands for the establishment of a foundling hospital, and the trustees named were directed to hold and convey the property "to any association, society or institution that may hereafter be in-

corporated by an act of Congress as and for such hospital" for foundlings.

There was, of course, no such corporation or hospital in existence, and no specification as to the description of foundlings to be admitted, and the court say, "The objection of uncertainty in this case as to the particular foundlings to be received is without force.

"The hospital *being incorporated*, nothing beyond its designation as the donee is necessary. Who shall be received, with all other details of management, may well be committed to those to whom its management is entrusted. This point is so clear that discussion or the citation of authorities is unnecessary."

The same objection of uncertainty as to the beneficiaries was made to a devise in trust to build, establish, and maintain two colleges "for the education of boys and girls," and the court held in the same manner, and that the trust was valid, in the case of

Perin *vs.* Cary, *et al.*, 24 How., p. 465.

These cases seem to definitely determine an executory donation, either by deed or will, for a charitable use, in favor of a corporation not *in esse*, but which may be subsequently organized, for a general purpose of benevolence indicated, is valid; and that the beneficiary, when it comes into being, will take the gift, and be clothed with discretion as to its management.

The same doctrine is held in numerous cases, and we need only refer in addition to the text and authorities cited in

Perry on Trusts, sec. 699.

Story Eq. Jur., sec. 1164.

The uniform rule is that charitable uses are favorites with courts of equity. And the construction of all in-

struments, where they are concerned, is liberal in their behalf.

Mills *vs.* Farmer, 19 Ves., 487.

The allegation is made in the bill of a "manifest purpose" on the part of Mr. Russell to "found" the institution mentioned, in his life-time.

We submit that no such purpose is manifested by the deeds.

On the contrary, the intention is expressed that Mr. Horner should take and sell the lands and pay the proceeds to Mr. Allen, as the President of the Board of Trustees, with no intimation that Mr. Russell proposed to have any further connection with the matter.

And in this connection the bill alleges that no authority was delegated by the deeds to Horner, nor to Allen, nor to any other person or corporation, to organize the proposed institute, and that no such authority has hitherto been exercised or claimed by any person or corporation.

It is true that no express authority is given to any persons specifically to organize the corporation contemplated, and it is true, as alleged, that no organization has yet been effected.

But no such authority from the grantor was needed to perfect a corporation under the laws of Missouri, for the purpose in question.

That organization was to be a voluntary one, and no restriction whatever is contained in the deeds, further than that it shall establish an institution for the education of youth in St. Louis County, and the wish *implied* that Thomas Allen should be President of its Board of Trustees.

The payments to be made by Horner, as Trustee, were to be made to the President, and while Mr. Allen is

named as such President, it is yet declared that such payments are to be for the use and benefit of the trustees of the Institute, "represented by their President, as aforesaid." Under the terms of the deeds any person who might see fit, can organize the corporation provided for, and any President of the Board of Trustees could receive the trust fund for the use and benefit of the institution, as well as Thomas Allen.

But in any event Thomas Allen is showu to be still alive. The corporation in question may still be organized, and Thomas Allen may still become its President.

This is sufficient under the decisions to prevent the failure of the trust. There is no time limited in the deeds for organization and institution, and no law fixing the period, and no authority exists outside of the admitted control of the court of equity, to compel the execution of the trust within any given time.

We may be pardoned in this connection for suggesting a reason for the delay which has occurred in completing the organization. The bill itself shows that Mr. Horner only sold a part of the property, and conveyed by deed (Exhibit 5) the remainder, *in specie*, to Mr. Allen, which remains undisposed of. It is evident that the extent and character of the Institute must be controlled by the amount of its endowment and means, and this can only be known when the entire amount of the donation is definitely ascertained. If any explanation is necessary in a suit brought by parties who appear to have no interest, legal or equitable, in the administration of the trust fund, we think this sufficient.

It appears from the bill that Mr. Horner paid the money and conveyed the property derived by him under the deeds to defendant, Thomas Allen, as an individual. There is no pretence that Mr. Allen received it from Horner in the

capacity of President of the Board of Trustees. These payments by Horner are therefore not in performance or discharge of the trust imposed upon him, and in contemplation of the law, the trust fund remains in Mr. Allen's hands as the agent or representative of the trustee Horner, ready and waiting to be turned over for the use and benefit of the institution as soon as it shall be organized. Of course equity would follow the fund in the hands of Mr. Allen, but it would be applied precisely in the same manner as if it remained in the hands of the trustee himself, so that the only connection of Mr. Allen with the case is as the depositary of the fund realized by Mr. Horner from the trust property, until the beneficiary shall come into being.

The authorities seem to be conclusive that mere lapse of time, or uncertainty as to when the use will be consummated, is immaterial.

In Ould *vs.* Washington Hospital, *supra*, as we have seen, the devise was of land for the erection of a foundling hospital "to be built and erected by any association, society, or institution that *may hereafter be incorporated* for that purpose." The court held the trust valid, and upon this point cited numerous authorities to sustain its decision. Among others, "Archbishop Secker by his will gave £1,000 to trustees for the purpose of establishing a bishop in the British possessions in America." Mansfield, of counsel, insisted that "that there being no bishop in America, or the least likelihood of there ever being one," the legacy was void and must fall into the residue. Lord Chancellor Thurlow said: "The money must remain in court till it shall be seen whether any such appointment shall take place."

Attorney General *vs.* the Bishop of Chester, 1 Brown's ch. R. 443.

"A testator devised his real estate to trustees in trust with the rents and profits to purchase ground in Cambridge proper for a college, and to build all such structures as should be necessary for that purpose (the college to be called "Downing College"), and to obtain a royal charter for founding such college and incorporating it by that name.

The trustees were to hold the premises devised to them "in trust for said collegiate body and their successors forever." The devise was held valid.

Attorney General *vs.* Downing, Ambler's R. 550.

"At common law lands may be granted to pious uses before there is a grantee competent to take. In the meantime the fee will lie in abeyance. It will vest when the grantee exists."

Town of Pawlet *vs.* Clark, 9 Cranch 292.
Beatty *vs.* Kurtz, 2 Pet. 566.
Vincennes University *vs.* Indiana, 14 How. 268.
Perry on Trusts, sec. 709.
Angell & A. on Corp. sec. 184.
Sanderson *vs.* White, 18 Pick. (Mass.) 328.

In conclusion, we submit that the principles established by the case of Ould *vs.* Washington Hospital, 5 Otto, 304 *supra*, are conclusive in this case.

While the intention is more precisely expressed in that case that the proceeds of the trust property should be given to a corporation thereafter to be formed, and by it applied to a specified charitable use, the same intention is as clearly manifested by the only legitimate rules of construction of the deeds here in question. The accidental circumstance in that case that the proposed corporation was created and received the donation prior to the commencement of the action, is immaterial, and does not

affect the principle involved. There was the same *possibility* in that case that the corporation might never be created, but as the authorities above cited show, the court will sustain the trust until it shall be seen that there is no possibility to effect the intention of the donor.

In that case, as in this, the gift was immediate and absolute, and vested the property in the trustee, and "it is clear beyond doubt that the testator meant that no part of the property so given should ever go to his heirs-at-law, or be applied to any other object than that to which he had devoted it by the devise here in question."

We respectfully submit that the demurrer to the bill was rightfully sustained.

THOROUGHMAN AND
W. R. DONALDSON,
Solicitors for Defendant Allen.

17-17

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 82.

WALLACE S. JONES AND NOBLE JONES, EXECUTORS OF GEORGE NOBLE JONES, DECEASED; WILLIAM H. HARRISON, EXECUTOR OF MARY G. HARRISON, DECEASED; ANNE M. CUTHBERT, WIDOW, AND ALFRED CUTHBERT, JR., AND MARY C. CUTHBERT, CHILDREN AND HEIRS AT LAW OF ALFRED CUTHBERT, DECEASED, AND WILLIAM A. RITCHIE, APPELLANTS,

vs.

WILLIAM N. HABERSHAM AND WILLIAM HUNTER, EXECUTORS OF MARY TELFAIR, DECEASED; THE TRUSTEES OF THE INDEPENDENT PRESBYTERIAN CHURCH OF SAVANNAH, THE UNION SOCIETY OF SAVANNAH, THE WIDOWS' SOCIETY OF SAVANNAH, THE PRESBYTERIAN CHURCH OF THE CITY OF AUGUSTA, THE GEORGIA HISTORICAL SOCIETY, AND MRS. VIRGINIA GOULD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED OCTOBER 16, 1879.

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1 UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

At a stated term of the 5th circuit court of the United States of America, for the southern district of Georgia, held at the United States court rooms in the city of Savannah, in and for the said district, on Monday, the fourteenth day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

Present the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, presiding, and the Hon. John Erskine, U. S. judge for Georgia.

WALLACE AND GEORGE NOBLE JONES, EX'ORS George N. Jones, dec'd, et al. compl's.
vs.
WM. NEYLE HABERSHAM AND WM. HUNTER, ex'ors Mary Telfair, dec'd, et al. def'ts.
} Bill of complaint.

Be it remembered that heretofore, to wit, on the third day of March, A. D. 1879, came the said complainants by their solicitors, W. W. Montgomery and J. R. Saussy, esquires, and filed their bill against the said defendants in the fifth circuit court of the United States, for the southern district of Georgia, in the words and figures following, to wit:

2 *Bill.*

UNITED STATES OF AMERICA:
Southern District of Georgia.

To the judges of the United States circuit court for said district:

Wallace S. Jones and Noble W. Jones, executors of George N. Jones, citizens of and resident in the State of Florida; William H. Harison, executor of Mary G. Harison, and a citizen of and resident in the State of New Jersey; Alfred Cuthbert, a citizen of and resident of the State of New York, and William A. Ritchie, a citizen of and resident in the State of Michigan, bring this their bill of complaint against William Neyle Habersham and William Hunter as executors of Mary Telfair, citizens of and resident in the State of Georgia and in said southern district, of which southern district said Mary Telfair, when in life, was a citizen and resident; and against The Independent Presbyterian Church of Savannah, The Union Society of Savannah, The Widows' Society of Savannah, The Presbyterian Church of Augusta, and The Georgia Historical Society, all corporations under and by virtue of the laws of said State of Georgia and citizens of and
3 resident in said last-named State and said southern district, and against Mary E. Thompson, a citizen of the State of Connecticut; Margaret Ewing Ritchie, also a citizen of Connecticut; Kentwyn Derenne, a minor, and a resident and citizen of the southern district of the State of Georgia, and a son of G. W. J. Derenne, of said district; Catherine Jones Bulloch, a citizen of the State of New Jersey; Martha Hunter, a citizen of New Jersey; Lydia Hunter, a citizen of New Jersey; Virginia Gould, a citizen of the southern district of Georgia, and wife of William T. Gould, of Augusta, Georgia; Frances F. Chrystie, a citizen of New York State; George Gibbons, a citizen of said southern district of Georgia; Louisa Alberta Wetter, a minor, a citizen of said southern district of Georgia, and

daughter of Alberta Wetter (Mary Martha Wetter, the other legatee under the nineteenth item of said will, having died since the death of said Mary Telfair), and against the following-named trustees under the twenty-first item of said will, to wit: Mrs. Louisa F. Gilmer, Sarah Owens, Mary Elliot (formerly Habersham), Susan Mann, Florence Bourquin, Eva West, and Eliza Chisholm, all citizens of said southern district of Georgia; and against Mary De Renne, wife of G. W.
4 J. De Renne, of Savannah; Mrs. Sarah H. Kollock, and Mrs. Mary Elliott, of Savannah; all citizens of the said southern district of Georgia; and against Mrs. Matilda Tillotson, a citizen of New York State; and Telfair Hodgson, a citizen of Virginia.

And thereupon your orators complain and say—

That said Mary Telfair died testate on the second day of June, 1875, a copy of whose will is hereto annexed, marked A, to which your orators pray the usual leave of reference.

That your orators Cuthbert and Richie, and the testators of the other complainants, with said Mary E. Thompson, a citizen of the State Connecticut, were at the death of said Mary Telfair her only heirs at law, and that the other named defendants are legatees or divisees under the said will of Mary Telfair, which has been duly admitted to probate in the court of ordinary in Chatham County, in the State of Georgia.

That said will undertakes to dispose of the property left by said testatrix, and amounting to six hundred and fifty-four thousand dollars, according to the appraisement of said estate, in value, in an illegal way, as your orators are advised and believe, and now charge:
5 1st. In violating the law against perpetuities.

2nd. In attempting to confer ultra vires powers upon the corporation devisees and legatees named in said will.

3rd. In attempting to convey large portions of said property upon indefinite charities without the intervention of any trustees capable of taking.

4th. In attempting to leave a portion of said property, and especially the residuary portion upon charity too indefinite and uncertain to be carried into effect.

5th. In attempting to provide in the 21st item of said will for the creation of a corporation incapable, under the laws of Georgia, of being created.

6th. In bequeathing property to charity when the testatrix died within ninety days after the execution of the will.

Your orators further shew that said will is inoperative as to all property therein attempted to be bequeathed, and concerning which all alienation is forever prohibited to the devisees of said property, because testratrix was advised and supposed that such prohibition was valid and that the property could never be alienated under said will without giving her executors the power of re-entering upon the same and repossessing themselves of it as part of her estate as provided for in the will.

6 Your orators further shew that said will was made by said testatrix under the conviction, and by the implied advise of her counsel learned in all the law, that all the provisions of the same were valid, and could, under the law, be carried into effect. Whereas your orators submit that such is not the case, and that all the legacies and devises contained in said will are inoperative, and more particularly those contained in the tenth, eleventh, twelfth, fourteenth, seventeenth, twenty-first, and twenty-third items of said will. Your orators further

shew that no such devises or legacies would have been created at all by the testatrix had she supposed that they would for any reason have been inoperative, and that it is manifest from the will itself that her intention was to create such devises and legacies only upon the illegal conditions which she has attached to them.

Your orators further shews that the devises and legacies contained in the tenth, eleventh, and fourteenth items are inoperative, for the reason that one or more of the subscribing witnesses are, and were at the execution of said will and the probate thereof and at the death of testatrix, a member or members of the corporations which are devisees and legatees under said items.

7 Your orators therefore submit that the devises and legacies contained in these items lapse and go to the heirs, and that this is even true of the one thousand shares of the Augusta & Savannah Railroad Company left to the Georgia Historical Society in the fourteenth item, for the reason that said company owns no personal property, and has leased its road and other realty perpetually to the Central Railroad, as fully appears by Exhibit B, hereto attached. Hence it is submitted these shares cannot fall into the residuum as personalty, but must, for all purposes of descent, at least, be regarded as realty; and the more especially is this true for the further reason that the residuum of said estate, exclusive of any lapsed legacies, amounted at the death of testatrix (which occurred on June 2nd, 1875) to some three hundred thousand dollars, a sum amply sufficient to carry out all the purposes contemplated by the testatrix in the twenty-first item or residuary clause of said will.

Your orators further shew that the Georgia Historical Society is prohibited by its charter, and was so prohibited at the death of testatrix, from receiving as income from any property it might hold to a

8 greater amount than five thousand dollars net.

Your orators further shew that at the death of testatrix, the net income of the Georgia Historical Society from property then held by it was between three and four thousand dollars, and that the net income annually derived by the testatrix up to the time of her death, and by her estate since, from said one thousand shares of stock was and is seven thousand dollars.

Your orators further shew that by the twenty-second item of said will none of the legacies, devises, and bequests in any of the clauses of said will are to be executed or take effect until the building and other improvements on the corner of Gaston and Whitaker streets, and known as the "Hodgson Memorial Hall," shall be completed and entirely paid for out of the estate of testatrix; and your orators shew that the building and other improvements referred to were in course of construction at the time of the death of testatrix, but were not completed till many months thereafter, and whether yet entirely paid for your orators are not certainly informed. If not paid for, it is the only debt known to your orators now existing against the estate.

9 Your orator further shew that the various acts of the legislature of Georgia, granting charters to incorporations, are by the law of said State public acts, and need not be herein specially set forth, your orators praying reference to them as often as may be necessary for the purposes of this bill. Your orators further shew that by the laws of Georgia no corporation can hold or receive any property not necessary for the purposes of its organization, and that the various corporations, devisees, and legatees under said will have been in existence for very many years, actively engaged in carrying out the pur-

poses of their organization, with incomes already at their conveniences and in some instances increasing their capital from the surplus of their income over and above their current expenses, as appears from the report of the treasurer of the Union Society for the year ending April first, 1875, a copy of which is hereto annexed, marked, "C," to which the usual reference is prayed.

Your orators therefore submit that any further increase of the capital of said corporations by donation would be in violation of the statutes of mortmain of the State of Georgia and contrary to the settled policy of the State as manifested in those acts.

10 Your orators further shew that the bequests to the Independent Presbyterian Church, contained in the tenth item of said will, is for purposes and upon conditions entirely beyond the powers conferred upon said corporation to carry into effect; and that so far as said bequest undertakes to create a trust, the beneficiaries are altogether uncertain and incapable of being ascertained. And that the same is true in reference to the bequest to the Georgia Historical Society, contained in the fourteenth item.

Your orators further show that the bequest contained in the twenty-first item of said will is for a purpose to which it is impracticable to give effect, for the reason that no such corporation as is therein directed to be created could be created under the laws of Georgia as they stood at the death of testatrix.

Your orators also submit that this bequest is especially obnoxious to the law against perpetuities, and for a charity too uncertain and indefinite for a court of chancery to give effect to, and shew that the proposed corporators were not associated together either in a corporate or unincorporate capacity at the execution of said will, or at the death of testatrix.

11 Your orators further shew that the twelfth item of said will provides for "benevolent," not charitable, purposes, and is altogether indefinite as to what particular purposes are intended, and that the thirteenth item is obnoxious to the law against perpetuites.

Your orators further shew that the devises and legacies under the twelfth, thirteenth, and twenty-first items are inoperative, because said devises and legacies are to corporations chartered, and to be chartered, for the support of the poor of Chatham County in said State of Georgia, and two of said subscribing witness*ing* to said will own, and did own at the time of the execution and at the probate of the will, and at the death of testatrix, taxable property, both realty and personalty, within said Chatham County, and are and were during the whole of said period, rated to pay, and do pay, on said property the poor rates for the support of the poor of said county.

Your orators further shew that they are advised, and so charge, that for the reasons aforesaid, a resulting trust in the whole estate of testatrix arises in favor of your orators and said Mary Thompson as the heirs at law of said testatrix; that your orators have frequently

12 called the attention of said executors to the law upon this subject and requested them to settle with your orators and said Mary Thompson, in whose behalf this bill is also brought if she chooses to unite with your orators and bear her pro rata of the expenses of this litigation, as the sole parties interested in the property in their hands, your orators aver'ing that there are no debts of testatrix to pay, the debt for Hodgson Memorial Hall possibly excepted, and your orators had well hoped that said executors would have complied with their reasonable request. But now, so it is, that they refuse so to do, and

insist that all of the provisions of said will are legal and valid, and they threaten to turn over all of said property to the devisees and legatees named in the will, and further threaten to take steps to carry into effect as near as may be the provisions of the twenty-first item of said will.

Your orators further shew that said executors are not only acting and threatening to act in utter disregard of your orators' rights in the premises, but have employed an unreasonable number of counsel to defeat your orators' claims, paying large and unnecessary fees for
13 such services, thus using your orators' own means to defeat their just rights.

Your orators expressly charge that the counsel first employed by said executors in the defence of said will are Messrs. Jackson, Lawton & Basinger, gentlemen of high skill and reputation in their profession, and fully able to cope with the best legal talent that your orators could hope to bring to the support of their claims; notwithstanding which your orators further allege that said executors in their desire to defeat your orators' claims have also retained Mess. Hartridge & Chisholm against your orators, and have already paid them some ten thousand dollars or other large sum to contest your orators' claims, and will doubtless pay them further large sums out of the funds of said estate, unless restrained by this honorable court.

Your orators further shew that said executors continue to employ all of said counsel, although some of the legatees under the will have retained Mr. William Grayson Mann and Mr. Charles C. Jones, jr., both gentlemen of high reputation at the bar, to contest your orators' rights to the property attempted to be bequeathed by said will; which said gentlemen are now actively engaged with the counsel for the ex-
14 ecutors in devising means of defense to defeat your orators' claims.

All of which actings and doings are contrary to equity and tend to the manifest injury and oppression of your orators, and for as much as your orators are remidiless at and by the strict rules of the common law, and can have adequate relief only in a court of equity, where matters of this sort are properly cognizable and relieveable, to the end, therefore, that the said defendants may, if they can, shew why your orators should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer, this is to say:

1. Are not said William Neyle Habersham and William Hunter the executors of said Mary Telfair?

2. Did not Mary Telfair die on June 2d, 1875?

15 3. Is not Exhibit A a correct copy of her will?

4. Are not complainants Cuthbert and Ritchie, and were not the testators of the other complainants at the death of testatrix, with Mary E. Thompson, the only heirs of Mary Telfair?

5. Was not said estate appraised at six hundred and fifty-four thousand dollars?

6. Did not said testatrix suppose, and was she not so advised by counsel learned in the law, that all the provisions of said will were valid, and could, under the law, be carried into effect, including the conditions attached to them?

7. Which of the subscribing witnesses is or are members of the cor-

porations to which devises or legacies are given by said will, and of which corporations? How long have they been such members?

8. Are not the corporations named as devisees or legatees in the twelfth, thirteenth, and twenty-first items of the will chartered, or to be chartered for the support of the poor of Chatham County?

16 9. Which of the subscribing witnesses to the will own taxable realty or personalty in Chatham County; how long have they owned it and paid, or been rated to pay, taxes for the support of the poor of said county?

10. What debts, if any, are owed by said estate?

11. Do not the executors insist that all the provisions of said will are valid, and do they not deny that the heirs of Mary Telfair have any interest in her estate as such heirs? Do they not refuse to turn over any of the property to them in their character as heirs?

12. What number of counsel have said executors employed to defeat the claims of the heirs? Who are those counsel, when were they employed, and how much has thus far been paid to them out of the funds of the estate? Are all of said counsel still in the employ of said executors? If not, who have been discharged?

13. How many counsel have been employed by the legatees,

17 and who are they? Are they not gentlemen of high rank in their profession, and are they not actively engaged with the counsel of the executors in devising means of defence to defeat complainants' claims?

14. Are not Messrs. Jackson, Lawton & Basinger lawyers of distinction, and fully capable of conducting the defence of this case?

15. Is not Exhibit B of this bill a correct copy of the lease between the Central Railroad and the Augusta & Savannah Railroad? What personal property does the Augusta & Savannah Railroad Company own, and what did they own at the death of testatrix?

16. Did not the residuum at the death of testatrix, first deducting all legacies and devises from the estate, amount to $300,000, and was not this sum ample for the purpose contemplated in the 21st item of the will?

17. What was the net income of the Georgia Historical Society, derived from property owned by it at the time of testatrix's death, and what per cent. of dividends did testatrix receive from the Au-

18 gusta and Savannah Railroad stock owned by her, and what have her executors received since her death?

18. When was Hodgson Memorial Hall and other improvements on the lot on the corner of Gaston & Whitaker streets, in the city of Savannah, completed? Have the building and other improvements ever been entirely paid for out of the estate of testatrix. If so, when was the last payment made, and by whom made?

19. How long have the corporation legatees and devisees been carrying out the purposes of their organization, and were they not so carrying them out at the death of testatrix?

20. Is not Exhibit C a correct copy of the report of the treasurer of the Union Society for the year ending April 1st, 1875?

21. Were the ladies named as trustees in the 21st item of the will associated together in any manner, whether corporate or unincorporate, at the death of testatrix, or at the execution of said will?

19 And that each and every of the devises and legacies in said will may be adjudged inoperative and void, and a resulting trust in all of said estate declared in favor of the heirs of said Mary Telfair, and the executors decreed to pay to your orators their distributive share

of said estate, and that in the meantime they may be restrained by the order of this court from all acts of waste, and especially that they may be restrained from employing more than a reasonable number of counsel, and those for such reasonable fees as it is just and proper for a stakeholder to pay in a controversy concerning the fund for which he is such stakeholder. And that your orators may have such other and further relief as the circumstances of the case may require and to your honours shall seem meet. May it please the court to grant unto your orators not only the writ of injunction to be directed to the said William Neyle Habersham and William Hunter, restraining them from all acts of waste, and especially from employing more than one legal firm at the expense of said estate in this litigation, but also the
20 usual writ of subpœna to be directed to the said William Neyle Habersham, William Hunter, The Independent Presbyterian Church of Savannah, The Widows' Society of Savannah, The Union Society, and The Georgia Historical Society, The Presbyterian Church of the city of Augusta, Kentwyn De Renne, Virginia Gould, George Gibbons, Louisa Alberta Wetter, Mrs. Louisa F. Gilmer, Sarah Owens, Mary Elliott, Susan Mann, Florence Bourquin, Eva West, Eliza Chisholm, Mary De Renne, and Mrs. Sarah H. Kolloch, all citizens of the southern district of Georgia. And that your honors will pass such order for service upon the non-resident defendants as to your honors shall seem proper, to wit, upon Mary E. Thompson and Margaret Ewing Ritchie, of Connecticut; Catharine Jones Bullock, Martha Hunter, and Lydia Hunter, citizens of New Jersey; Frances F. Christie and Mrs. Matilda Tillotson, of New York, and upon Telfair Hodgson, of Virginia, commanding them, under a penalty to be therein limited, by attorney and personally, or by attorney, to be and appear on a certain day before this honorable court to make answer to the matters and things herein set forth. And your orators will ever pray, &c.

21 W. W. MONTGOMERY,
J. R. SAUSSY,
Compl'ts' Sol'rs.

NOTE.—Each defendant is required to answer all the interrogatories.
W. W. MONTGOMERY,
Compl'ts' Sol'r.

STATE OF GEORGIA,
Chatham County:

I, one of the complainants in the foregoing bill, do swear that the facts alleged in said bill, so far as they relate to my own act and deed, are true of my own knowledge, and so far as they relate to the acts & deeds of others, I believe them true.

Sworn to & subscribed before me this , 187 .

22 EXHIBIT A.

I, Mary Telfair, of the city of Savannah and State of Georgia, being of sound and disposing mind and memory, do hereby make, publish, and declare this my last will and testament, hereby revoking and making null and void any and every will by me any time heretofore made.

First. I hereby give, devise, and bequeath to George Noble Jones, son of the late Noble Wymberly Jones, all that full lot of land in the city of Savannah on Bryan street, east of and near Drayton street,

with the buildings and improvements thereon, commonly known as "Oglethorpe Hall," to him and his heirs forever; and I also give, devise, and bequeath to the said George Noble Jones, to him and his heirs forever, all those lots of lands on Fahm, Poplar, and Harrison streets, in the city of Savannah, of which I am seized and possessed, or of which I am at present the bona fide owner.

Second. I hereby give, devise, and bequeath to Mary Harrison, wife of the reverend William Harrison, at present residing in Newark,
23 New Jersey, for her sole and separate and only use, and subject to her exclusive control and disposition, one hundred shares of the capital stock of the Southwestern Railroad of the State of Georgia.

Third. I give, devise, and bequeath to Mary E. Thompson, a resident of Litchfield, Connecticut, one hundred shares of the capital stock of the Camden and Amboy Railroad of New Jersey, each share of the par value of one hundred dollars, the dividends on said stock to be paid by my executors regularly to the said Mary E. Thompson during her life, and the shares to be subject to disposition at her death by the last will and testament of the said Mary E., or any instrument in the nature thereof to be executed by her.

Fourth. I give, devise, and bequeath to Margaret Ewing Ritchie, neice of the said Mary E. Thompson, also one hundred shares of the capital stock of the Camden and Amboy Railroad Company, the dividends arising from the same to be paid by my executors regularly to the said Margaret Ewing Ritchie, for her sole and separate use, and the shares to be subject to disposition after her death by the last will and testament of the said Margaret Ewing Ritchie, or any instrument of
24 writing for that *for that* purpose made and executed by the said Margaret.

Fifth. I give, devise, and bequeath to Kentwyn DeRenne, son of G. W. J. DeRenne, of Savannah, fifty shares of the capital stock of the Southwestern Railroad of Georgia.

Sixth. I give, devise, and bequeath to Catherine Jones Bulloch, now residing in Morristown, New Jersey, fifty shares of the capital stock of the Southwestern Railroad Company of Georgia, to receive the dividends regularly from my executors during her life, and from and after her death said shares to be held by my executors and their successors in trust for the use and benefit of the three neices of the said Catherine Jones Bulloch, to wit, Martha Hunter, Lydia Hunter, and the present wife of William T. Gould, of Augusta, formerly named Hunter, and for the use and benefit of the survivor of them.

Seventh. I give, devise, and bequeath to my friend Frances F. Chrystie, of Hastings, on the Hudson River, one thousand dollars should she survive me, and not otherwise.

Eighth. I give, devise, and bequeath to my friend Matilda F. Tillotson, if she survives me, and not otherwise, one thousand dollars.

25 Ninth. I give, devise, and bequeath to my faithful colored servant George, now in my service, twenty-five shares of the capital stock of the Southwestern Railroad of Georgia, provided said servant George be in life at the time of my death.

Tenth. I hereby give, devise, and bequeath to the trustees of the Independent Presbyterian Church, of the city of Savannah, all that full lot of land in the city of Savannah on the southwest corner of Broughton and Bull streets, with the buildings and improvements thereon, to have and to hold the same on the following terms and conditions, and not otherwise, to wit: First. That the trustees of the said Independent Church shall appropriate annually out of the rents and profits of

said lot and improvements the sum of one thousand dollars to one or more Presbyterian or Congregational Churches in the State of Georgia, in such destitute and needy localities as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the State. Second.

This gift and devise is made on the further condition that
26 neither the trustees nor any other officer of said Independent Presbyterian Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the corner of Bull and South Broad streets, but will permit the same to remain substantially as they are, subject only to proper repairs and improvements, nor shall they sell or alien the lot on which the Sabbath school room of said church now stands, but shall hold the same to be improved in such manner as the trustees or pew-holders may direct. Third. Upon the further condition that the trustees of said Independent Presbyterian Church will keep in good order, and have thoroughly cleaned up every spring and autumn, my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault or within the enclosure of said lot, and for the purpose of having the same protected and cared for, I hereby give, devise, and bequeath my said lot in the Bonaventure cemetery to the trustees of the Independent Presbyterian Church and their successors.

27 Eleventh. I give and devise to the Union Society of Savannah all that lot or parcel of land in the city of Savannah on the north side of Bay street, and at or near its intersection with Jefferson street extended or prolonged, known in the plan of said city as lot letter "B," with the buildings and improvements thereon, but on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society.

Twelfth. I give, devise, and bequeath to the Widows' Society of Savannah, all that lot or parcel of land in Savannah on the corner of President and West Broad street, on which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society, but this devise is made on condition the said Savannah Widows' Society shall not sell or alienate said lot or improvements, nor hold the same subject to the debts, contracts, or liabilities of said society.

28 Thirteenth. Should either one or more of the corporate bodies or institutions named in the preceding items of my will attempt to sell, alienate, or otherwise dispose of the property and estate therein devised, contrary to the terms and conditions therein set forth, or should there be any levy on the same to satisfy the debts of said corporation, then I hereby direct my executors or legal representatives to repossess and enter upon said property or estate as to which the conditions may be so broken or violated, and in that event I do hereby give and devise the said property so entered upon and repossessed unto the Savannah Female Orphan Asylum.

Fourteenth. I hereby give, devise, and bequeath to the Georgia Historical Society and its successors all that lot or parcel of land, with the buildings and improvements thereon, fronting on St. James Square, in the city of Savannah, and running back to Jefferson street, known in the plan of said city as lot letter "N," Heathcote Ward, the same having been for many years past the residence of my family, together with

all my books, papers, documents, pictures, statuary, and works of art, or having relation to art and science, and all the furniture of
29 every description in the dwelling-house and on the premises (except bedding and table service, such as china, crockery, glass, cutlery, silver, plate, and linen), and all fixtures and attachments to the same, to have and to hold the said lot and improvements, books, pictures, statuary, furniture, and fixtures, to the said Georgia Historical Society and its successors, in special trust, to keep and preserve the same as a public edifice, for a library and academy of arts and sciences, in which the books, pictures, and works of art herein bequeathed, and such others as may be purchased out of the income, rents, and profits of the bequest hereinafter made for that purpose, shall be permanently kept and cared for, to be open for the use of the public on such terms and under such reasonable regulations as the said Georgia Historical Society may from time to time prescribe; but this devise and bequest is made upon condition that the Georgia Historical Society shall cause to be placed and kept over and against the front porch on entrance of the main building on said lot a marble slab or tablet, on which shall be cut or engraved the following words, to wit:

TELFAIR

ACADEMY OF ARTS AND SCIENCES.

30 the word "Telfair" being in larger letters and occupying a separate line above the other words; and on the further condition that no part of the buildings shall ever be occupied as a private residence or rented out for money, and none but a janitor and such other persons as may be employed to manage and take care of the premises shall occupy or reside in or upon the same, and that no part of the same shall be used for public meetings or exhibitions, or for eating, drinking, or smoking, and that no part of the lot or improvements shall ever be sold, alienated, or encumbered, but the same shall be preserved for the purposes herein set forth. And it is my wish that whenever the walls of the building shall require renovating by paint or otherwise the present color and design shall be adhered to as far as practicable. For the purpose of providing more effectually for the accomplishment of the objects contemplated in this item or clause of my will, I hereby give, devise, and bequeath to the Georgia Historical Society, and its successors, one thousand shares of the capital stock of the Augusta and Savannah Railroad of the State of Georgia, in special trust, to apply the dividends, income, rents, and profits arising
31 from the same to the repairs and maintenance of said buildings and premises and the payment of all expenses attendant upon the management and care of the institution herein provided for, and then to apply the remaining income, rents, and profits in adding to the library, and such works of art and science as the proper officers of the Georgia Historical Society may select and in the preservation and proper use of the same, so as to carry into effect in good faith the objects of this devise and bequest.

Fifteenth. Such of my household furniture as is not included in the above bequest to the Georgia Historical Society, (except silver and silver-plate, which is hereinafter provided for), and all kitchen furniture proper and wearing apparel, I hereby give and bequeath to Mary E. Thompson, hereinbefore named, to be disposed of as she may think most proper.

Sixteenth. I hereby give and bequeath to such persons as I may name and indicate on a list to be signed by me and folded up with
32 this, my will and in the propo'tions and of the classes therein set forth, all my silver-ware and plate of every description, said list to be taken as part of this my last will and testament, and said persons therein named to be legatees under this clause or item of my will.

Seventeenth. I hereby give, devise, and bequeath to the Presbyterian Church of the city of Augusta, which has its church edifice on Telfair street in that city, or to the trustees thereof, and its or their successors, the sum of thirty thousand dollars in United States currency, to be appropriated to and expended in the building and erection of a suitable and commodious Sunday-school house and library on a portion of said lot fronting on Telfair street. And I hereby request and direct my executors to pay over said sum of thirty thousand dollars from funds in the hands of Baring Brothers and Company, of London, which funds are to be by them withdrawn after my death.

Eighteenth. In addition to the gifts and bequests to Mary E. Thompson and her niece and adopted daughter, Margaret Ewing Ritchie,
33 contained in the third and fourth items or clauses of this my will, I do hereby further give and bequeath to each of them one hundred and twenty-five shares of the capital stock of the Southwestern Railroad Company of Georgia, to be held upon the same trusts, uses, and conditions as are set forth in said third and fourth clauses respectively.

Nineteenth. I hereby give, devise, and bequeath to my executors hereinafter named, and to the survivor of them, twenty-nine thousand dollars in the registered bonds of the United States, at their par value, in trust, to hold the same for the only use and benefit of Mary Martha Wetter and Louisa Alberta Wetter, children of the late Alberta Wetter, formerly Alberta Cobb, to pay the income, rents, and profits arising from the same directly for the support and education of the said Mary Martha Wetter and Louisa Alberta Wetter, and the survivor of them, not into or through the hands of their father or any other person for them until both of them, or the survivor of them, shall arrive at twenty-one years of age. And after they, or the survivor of them, shall have arrived at the age of twenty-one years, to pay the income
34 arising from this bequest to the said Mary Martha Wetter and Louisa Alberta Wetter, or the survivor of them, directly, and not into or through the hands of any other person, during the natural lives of them, or the survivor of them, and from and after the death of the survivor to divide the same, with any accumulations of income or interest that may have been invested, equally among the children of the said Mary Martha Wetter and Louisa Alberta Wetter, who may be then living, and in default of any such children then living to return the corpus of this bequest with any accumulations thereon to the body of my estate to be disposed of as directed and provided for in the residuary clause of this my will.

Twentieth. It is my wish and desire, and I do hereby so request, that my friend Mary E. Thompson, hereinbefore named, shall remain in my dwelling-house a sufficient time after my death to assort and arrange the furniture, wearing apparel, and other articles of value, and to take away such as are not included in the devise and bequest to the
35 Georgia Historical Society; and I desire that no formal inventory be taken or made of said furniture, apparel, and other articles in my dwelling-house to be returned to the court of ordinary, and that no

auction or sale of any kind shall take place in the house or on the premises.

Twenty-first. All the rest and residue of my estate, of whatever the same may consist, real, personal, and mixed, and wherever situated, I hereby give, devise, and bequeath to my executors hereinafter named, and to the survivor of them, and to the successors in this trust of said survivor, in trust, to use and appropriate the proceeds arising from the same to the building and erection and endowment of a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for in such manner and on such terms as may be defined and prescribed by the trustees or directresses provided for in this item or clause in my will. The income, rents, and profits of such portion of the residuum of my estate as may not be expended in the building, erection, and
36 furnishing said hospital shall be annually appropriated to the support and maintenance of the same. My desire and request is that a thoroughly convenient hospital, of moderate dimensions, suited to the wants of the city of Savannah, and capable of enlargement if necessity should require, may be built and erected, with no unnecessary display connected with it. And I do hereby nominate as the first trustees, managers, or directresses of said hospital, Mrs. Louisa F. Gilmer, Sarah Owens, Mary Elliott (formerly Habersham), Susan Mann, Florence Bourquin, Eva West, and Eliza Chisolm, all of Savannah, Georgia, and do request and instruct my executors to advise and consult with the ladies named as to the construction, arrangement, and furnishing of said hospital. It is further my wish and desire, and I do hereby request, that a suitable and proper act of incorporation for said hospital shall be obtained from such tribunal in the State of Georgia as may have jurisdiction in the premises, to be called and known as the "Telfair Hospital for Females," with the ladies above named, or such of them as may consent to serve, and such others as they
37 may apply for to be associated with them, as the first trustees, managers, or directresses under said act of incorporation, with power to fill any vacancies that occur in their number. And for the purpose of accomplishing the objects contemplated in this item or clause of my will, I do hereby authorize and empower my executors, or the survivor of them, to sell and convey all or any portion of the real estate, or any interest in the same, which I may have or be entitled to, and not given or devised in any of the previous items or clauses of this my will, using their discretion as to private or public sales, and as to whether and at what time such sales shall be made.

Twenty-second. It is my wish, and I hereby so direct, that none of the legacies, bequests, and devises in any of the clauses of this my will shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the "Hodgson Memorial Hall," which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate.

38 Twenty-third. I hereby give and bequeath to the First Christian Church, erected or to be erected, in the village of Telfairville, in Burke County, or to such persons as may become trustees of the same, the sum of one thousand dollars, and a like sum of one thousand dollars to the Hodgson Institute, in the same village.

Lastly. I hereby nominate William Neyle Habersham and William Hunter, both of the city of Savannah, as the executors of this my last will and testament, and trustees under the provisions of the same.

In witness whereof I do hereby and hereto set my hand and seal this first day of June, in the year eighteen hundred and seventy-five.

MARY TELFAIR.

Signed, sealed, declared, and published by Mary Telfair, the testatrix, as and for her last will and testament, in our presence, who, in her presence and at her request, and in the presence of each other, have subscribed the same as attesting witnesses (the word "not" being erased and written again in nineteenth clause) fifteen pages of writing, the seventh page being blank.

39

A. R. LAWTON.
JAS. B. REID.
WILLIAM J. MARSHALL.

SAVANNAH, *May* 29, 1874.

Memorandum of silver plate, &c., to be divided as herein set forth among my friends named, and to be taken as part of my last will and testament.

I give to Mrs. Mary Harrison, wife of the Rev'd W. H. Harrison, of Newark, New Jersey, a plain silver tea set, consisting of a tea-pot, milk-pot, sugar-dish and bowl, marked W. G.; also a pair of small wrought-silver waiters, without any initials upon them.

I give to Mrs. Mary De Renne, wife of G. W. J. De Renne, of Savannah, an ancient carved coffee-pot, of silver; also, a silver tureen and a pair of carved oyster dishes, with covers to them; also, a small carved cake-basket.

I give to Mrs. Francis Chrystie, of Hastings-on-the-Hudson, State of New York, a large silver cake-basket, with a handle across the top, marked "Telfair;" also, two plain silver dishes for vegetables, with covers to them, without a mark.

40

I give to Mrs. Matilda Tillotson, of New York, a dozen dessert silver knives and forks and one dozen silver tablespoons, marked M. T., also a silver saucepan with a cover to it.

I give to Mrs. Sarah H. Kolloch a silver chocolate pitcher, with a top to it.

I give to Mrs. Mary Elliott, of Savannah, Orleans Square, one large silver cake-knife.

I give to the Rev'd Telfair Hodgson, one dozen teaspoons, marked with the Hodgson crest, a bird, on the handle of each spoon. I also give to him a gold watch, worn by his uncle, William B. Hodgson.

The remainder of my silver-plate, not hereinbefore named, I give to Mary E. Thompson, for and during her natural life, and after her death to her neice, Margarent Ewing Ritchie.

MARY TELFAIR.

41

In presence of—in duplicate—
A. R. LAWSON.
WILLIAM J. MARSHALL.
JOHN S. COBURN.

ORDINARY'S OFFICE,
Chatham County, State of Georgia:

I, , ordinary of Chatham County, State of Georgia, do hereby certify the foregoing instrument to be a true and faithful copy of the last will and testament, and "attested memorandum" thereto, of Mary Telfair, late of said county and State, deceased, as appears, reference being had to the original on file and of record in this office.

In witness whereof I have hereunto set my official signature and attached the seal of the court of ordinary, at the city of Savannah, county and State aforesaid, this June 9th, A. D. 1875.

[SEAL.]

O. C. C.

42 EXHIBIT B.

This indenture, made the 1st day of May, in the year of our Lord, 1862, between the Augusta & Savannah R. R., formerly the Augusta & Waynesboro R. R., of the one part, & the Central R. R. & Banking Co. of Ga. of the other part, witnesseth that whereas, in & by an act of the gen'l assembly of the State of Georgia, passed on the 22nd day of January, 1852, express authority was granted to the said Central R. R. & Banking Co. of Ga. to lease & work the Augusta & Waynesboro R. R. & all roads connecting with the Central R. R.; & whereas, also, it is provided in the charter of the said Augusta & Savannah R. R., formerly the Augusta & Waynesboro R. R., that said co. may rent or farm out all or any part of their exclusive right of transportation of freight or conveyance of passengers to any other co.; & whereas the Augusta & Savannah R. R. has agreed to leave to the said The Central R. R. & Banking Co. of Ga. their R. R. leading & running from Millen to Augusta, with all their locomotive engines, cars, & material of every kind and description, & their right to carry freight &
43 passengers & to collect the money therefor, said lease to begin the day of the date of these presents, & to run & continue during the whole charter of the said Augusta and Waynesboro Railroad, and of the said Augusta & Savannah R. R.; that is to say, in perpetuity, at a rent of $73,000 per annum, payable as follows: The rent for the month of May to be paid on the 1st day of June next, & then semi-annually, payment to be made on the 1st Monday in Dec., next; the next payment to be made on the 1st Monday in June, 1863, & thereafter on the said 1st Mondays in Dec. & June.

Now, this indenture witnesseth that the said The Augusta & Sav'h R. R., formerly the Augusta & Waynesboro R. R., hath leased & let, and by these presents doth lease & let and grant unto the said The Central R. R. & Banking Co. of Ga. all & singular the R. R. leading & running from the Central R. R. at Millen to the city of Augusta, together with all the engines, locomotive or stationary cars, repair cars, wells, cisterns, sidings, depots, stations, warehouses, buildings, fixtures, rights, members, and appurtenances and privileges of every nature & kind whatsoever; to have and to hold the said R. R. and appurtenances unto the said The Central R. R. & Banking
44 Co. of Ga. for, during, & until the full term & end of the charter of the Augusta & Waynesboro R. R. & of the Augusta & Sav'h R. R.; that is to say, in perpetuity, free, & clear of every claim & demand for right of way for damages or other cause which may at this day exist against the said The Augusta & Sav'h R. R., it being understood that forfeiture of the charter for any act or thing done or suffered by the said C. R. R. & Banking Co. of Ga. shall not terminate the lease or affect the relations of the contracting parties towards each other, and the said The C. R. R. & Banking Co. of Ga. hereby covenants, agrees, & promises to pay rent for said R. R. & appurtenances as above let unto the said Augusta & Sav'h R. R. as follows:

The rent for May to be paid on the 1st of June next, & thereafter $6,500 on the 1st Monday in Dec. next, and a like sum on the first

Monday in June, 1863, and a like sum on every 1st Monday in Dec. and June during and to the end of this lease, and further to grant to the directors and president of the Augusta and Sav'h R. R. as long as their organization is kept up free travel between the cities of Savannah and Augusta, and further to pay all taxes that may legally
45 be imposed by the Confederate States of America on said R. R. leased as aforesaid, the tax imposed by the state of Ga. to be paid by the said Augusta and Savannah R. R. And the said The Central R. R. & Banking Co. of Ga. hereby agrees to indemnify the said Augusta & Savannah R. R. against all claims for loss or damage to stock or to persons during the continuance of this lease. In witness whereof the Augusta & Sav'h R. R. hath hereto caused to be affixed its corporate seal with the signature of its president, & the said The Central R. R. & Banking Co. of Ga. hath caused to be affixed its corporate seal with the signature of its president in virtue of resolutions passed for that purpose by the respective boards of directors the day and year 1st above written.

(Signed) R. R CUYLER,
Prest. of the Central R. R. & Banking Co. of Ga.

Attest:
GEO. A. CUYLER, [L. S.]
(Signed) FRANCIS T. WILLIS, [L. S.]
President Augusta & Sav'h R. R.

46 EXHIBIT C.

Treasurer's report of the Union Society.

SAVANNAH, *April* 22, 1875.

Mr. WM. M. WADLEY,
President of the Union Society:

DEAR SIR: I herewith transmit a balance sheet & statement Union So. books; also a consolidated cash exhibit for the year ending April 1st, 1875, showing the following result, viz:

NET RECEIPTS.

Bal. on hand last year	887 38	
Pavilion Hotel	3,164 70	
Maria Edwards fund	844 85	
John Kelly fund	1,116 03	
Springfield plantation	168 18	
Membership	1,088 00	
Interest account	145 00	
Profit & loss	2 00	
Donations	75 75	
S. Z. Murphy	710 00	
		8,202 49

DISBURSEMENTS.

Stocks & bonds, additional investment	227 50	
Profit and loss, old bill for design of building	100 00	
Expense account, insurance on Bethesda & expenses 124th anniversary	338 72	
Bethesda expenses, subsistence, clothing, &c.	5,504 07	
		6,270 29
Leaving a bal. on hand of		$1,932 20

47 It will be observed that the following property, which appears on the society's books at a valuation of $36,925.80, yields no revenue, viz, lands in Iowa, Atlantic & Gulf R. R. stock, Southern R. R. bonds, & Bethesda (the last named being used for the society), while the Springfield plantation, valued at $10,000, only pays a 1.68 per ct. on that sum.

A comparison of expenses for Bethesda this year with the three preceding years shows very favorably for this year, being eleven per ct. less than last year, 23 per ct. less than 1873, & 16 per ct. less than 1872.

Respectfully submitted.

S. M. COLDING,
Treas. Union Society.

Treas'r's report.

S. M. Colding, treas., in a/c with Union So. from April 1, 1874 to April 1, 1875.

DR.

Bal. on hand April 1st, 1874		$887 38
Stocks & bonds: Rec'v'd for 500 shares So. Ins. & Trust Co.'s stock		875 00
Donations: Rec'v'd from unknown friend through Rev'd Mr. Gordon	$2 00	
Rec'd from Geo. N. Nichols one-half printing bill	63 75	
Rec'v'd from Rev. Geo. H. Clark, D. D.,		
48 Hartford, Conn	10 00	
		75 75
Springfield plantation: Rec'v'd for rent lots Nos. 105, 111, & 112		168 18
John J. Kelly fund: Rec'd for rent of buildings		1,714 00
Maria Edwards fund: Rec'v'd from Geo. Allen 7 mos. rent, at $83.33	583 31	
Rec'd from Geo. Allen 5 mos. rent, at $75.00	375 00	
		958 31
Pavilion Hotel: Rec'v'd 1 year's rent from P. J. Hobart	3,600 00	
4 months' rent of garden	100 00	
Dividend So. Mutual Insurance Co	49 50	
		3,749 50
Membership: Rec'd for members' dues		1,140 00
Interest account: Rec'v'd for coupons Columbus City bonds	70 00	
Dividends So. Ins. & Trust Cos	75 00	
		145 00
Profit & loss: Rec'd for 1 historical record		2 00
Expense a/c: Rec'd for dividend So. Mutual Ins. Co.		27 00
49 S. Z. Murphy: Rec'd on a/c note		710 00
		$10,452 12
April 1, 1875, bal. on hand brought down		1,932 20

CR.

Stocks & bonds: P'd for 15 shares So. Western R. R. stock		1,102 50
Bethesda: P'd bills for subsistence	4,017 39	
P'd bills for clothing	506 22	
P'd bills for farming	625 75	
P'd bills for education	454 71	
		5,604 07
Jno. J. Kelly fund: P'd bills for repairs	329 82	
P'd bills for insurance	176 75	
P'd dispossessory warrant	5 00	
		511 67
Profit & loss: P'd A. W. Whitney, old bill for plan of building		100 00
Pavilion Hotel: P'd bills for repairs	392 30	
P'd bills for insurance	200 00	
		492 30
Maria Edwards fund: P'd bill for repairs	32 15	
P'd bill for insurance	57 30	
		89 45
Expense account: P'd ins. on buildings at Bethesda	190 00	
P'd expenses 124th anniversary, printing, &c.	165 22	
50 P'd receipt book & stamps	10 50	
P'd com. collecting members' dues	52 00	
P'd com. collecting Kelly buildings	85 70	
P'd com. collecting Maria Edwards buildings	24 01	
P'd com. collecting pavilion rent	92 50	
		619 93
Bal. carried down		1,932 20
		10,452 12

Savannah, April 1st, 1875.

S. M. COLDING, *Treasurer.*

Examined & found correct.
Savannah, April 22, 1875.

G. M. SORREL,
D. G. PURSE,
Committee.

Bal. sheet & statement Union Society's books, April 1, 1875.

DR.

Real estate, viz:		
Pavilion Hotel	$30,000 00	
160 acres land in Al'amake' Co., Iowa	400 00	
19 lots, Springfield plantation	10,000 00	
East half lot & improvements No. 8, Belitha Tything, Heathcote ward, city of Sav'h	10,000 00	
Trust lot, letter O, Heathcote ward, city of Sav'h, & improvements	15,000 00	
Bethesda, Chatham Co., and improvements	35,925 80	
		$101,325 80

51 Stocks & bonds:		
5 shares Atlantic & Gulf R. R. stock, at par	500 00	
2 bonds, city of Columbus, $500 each	1,000 00	
1 bond So. R. R.	100 00	
15 shares So. W. R. R. stock	1,102 50	
		2,702 50
S. Z. Murphy, bal. due on farm		700 00
Profit & loss, bal. of this a/c		1,091 75
Cash a/c, am't on hand		1,932 20
		$107,752 25

CR.

Union Society, Savannah, Ga., April 1st, 1875.
S. M. COLDING, *Treas.*

(Endorsed:) No. 154. U. S. circuit court, southern district of Georgia. In equity. Wallace and George Noble Jones, ex'ors. George N. Jones et al. vs. Wm. N. Habersham & Wm. Hunter, ex'ors, Mary Telfair, et al. Original bill, &c. Filed this 3rd day of March, 1879. Willard P. Ward, clerk. W. W. Montgomery, J. R. Saussy, for compl'ts.

52 And afterwards, to wit, on the fifth day of April, eighteen hundred and seventy-nine, on motion of complainants' solicitors, a subpœna was issued for William Neyle Habersham and William Hunter, executors of Mary Telfair, Independent Presbyterian Church of Savannah, Georgia Historical Society, Union Society of Savannah, and the Widows' Society of Savannah, as follows:

Subpœna.

UNITED STATES OF AMERICA,
Southern District of Georgia:

The President of the United States of America to Wm. Neyle Habersham and Wm. Hunter, ex'rs Mary Telfair, Independent Presbyterian Church of Savannah, Union Society of Savannah, the Georgia Historical Society, the Widows' Society of Savannah, greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you and each and every of you are hereby commanded and strictly enjoined that, laying all other matters aside, and notwithstanding
53 any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Savannah, at rules to be had on the first Monday in May next, to answer to those things which shall then and there be objected to you in a bill for injunction, relief, &c., and to do further and receive what the said court shall have considered in that behalf, and this you may in no wise omit under penalty of five hundred dollars, and have here this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Savannah, this 5th day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] WM. M. HEYWARD,
Deputy Clerk.

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated in the clerk's office on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken pro confesso.

WM. M. HEYWARD,
Deputy Clerk.

54 And afterwards, to wit, on the 5th day of April, A. D. 1869, the following service was made, to wit:

Service.

Service of the above subpœna acknowledged, and copy waived, this 5th day of April, 1879.

A. R. LAWTON,
W. S. CHISOLM,
Solicitors for the Executors of Mary Telfair, Henry R. Jackson, President Geo. His. Society.
W. GRAYSON MANN,
Solicitor for the Independent Presbyterian Church and the Sav. Widows' Society; J. H. Estill, Pres't Union Society.

And afterwards, to wit, on the 5th day of May, A. D. 1879, the following proceedings were had, to wit:

Precept for appearance.

The clerk of this court will please enter our appearance as solicitors for the defendants, Wm. N. Habersham and Wm. Hunter, ex'ors in the above-entitled cause.

Dated May 5th, 1879.

55 A. R. LAWTON,
W. R. CHISOLM,
Solicitors for Defendants named.

Appearance.

On filing precept in this cause, and on motion of A. R. Lawton and W. S. Chisolm,

Ordered, that their appearance as solicitors for defendants Wm. N. Habersham and Wm. Hunter, executors herein, be, and the same hereby is, entered, and that the cause be now docketed for said defendant.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of May, A. D. 1879.

[SEAL.] WILLARD P. WARD, *Clerk.*

NOTICE.—If the defendant wishes to enter his appearance in the cause herewith served, it is suggested that he hand the subpœna and this blank to his attorney, who will fill it up and forward to the clerk; solicitor will order copy of bill, if he wishes it, at the same time.

56 And afterwards, to wit, on the 5th day of April, A. D. 1879, the following proceedings were had, to wit:

Subpœna.

The President of the United States of America to the Presbyterian Church of Augusta, Ga., and Mrs. Virginia Gould, greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you

and each of you are hereby commanded and strictly enjoined that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, wheresoever the same shall then be, at rules to be had on the first Monday in May next, to answer to those things which shall then and there be objected to you in a bill for relief, &c., filed by the said complainants, and to do further and receive what the said court shall have considered in that behalf, and this you may in no wise omit, under a penalty of five hundred dollars.

Witness the honorable Morrison R. Waite, Chief Justice of the
57 Supreme Court of the United States, at Savannah, in said district, this 5th day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of American Independence the one hundredth and third.

[SEAL.] WM. M. HEYWARD,
Dep. Clerk.

W. W. MONTGOMERY,
J. R. SAUSSY,
Complainants' Solicitor.

MEMORANDUM.—The defendants are required to enter appearance in the above case, in the clerk's office, on or before the day to which this writ of subpœna is returnable; otherwise the bill may be taken pro confesso against them.

WM. M. HEYWARD,
Dep. Clerk.

W. W. MONTGOMERY,
J. R. SAUSSY,
Complainants' Solicitor'.

And afterwards, to wit, on the said 5th day of April, the following acknowledgment was filed:

Acknowledgement of Service.

Service of subpœna acknowledged. Copy and further service waived this 5th April, A. D. 1869.

CHARLES C. JONES, JR.,
Solicitor for the Presbyterian Church of Augusta, one of the Defendants.
WM. T. GOULD,
VIRGINIA H. GOULD.

58 And afterwards, to wit, on the 5th day of May, A. D. 1879, the following proceedings were had, to wit:

Precept for appearance and order thereon.

TO WILLARD P. WARD, Esq,
Clerk, &c., &c., Savannah, Georgia:

DEAR SIR: At the rules day in May next, enter my appearance in this case for the Presbyterian Church of Augusta, one of the defendants named in the bill.

Yours, &c.,

CHARLES C. JONES, JR.,
Solicitor for the Presbyterian Church of Augusta, one of the Defendants.

AUGUSTA, GEORGIA, *April 8th*, 1879.

On filing precept in this cause, and on motion of Charles C. Jones, jr., ordered that his appearance as solicitor for defendant, the Presbyterian Church of Augusta, herein be, and the same hereby is, entered, and that the cause be now docketed for said defendant.

59 Witness the honorable Morrison R. Waite, Ch'f Justice Supreme Court of the United States, this 5th day of May, A. D. 1879.

[SEAL.] WM. M. HEYWARD,
Dep. Clerk.

NOTICE.—If the defendant wishes to enter his appearance in the cause herewith served, it is suggested that he hand the subpœna and this blank to his attorney, who will fill it up and forward to the clerk. Solicitor will order copy of bill, if he wishes it, at the same time.

And afterwards, to wit, on the 5th day of May, A. D. 1879, the following proceedings were had, to wit:

Demand for letters of attorney.

And now, on this fifth day of May, 1879, and on the rule day of said court in said month, come the defendants William N. Habersham and William Hunter, the executors of the will of Mary Telfair, by their
60 solicitor', A. R. Lawton and W. S. Chisolm, and after duly entering their appearance and before demurring, pleading, or answering in said cause, and make demand that the solicitors of the said complainants do produce and file in this court the letter of attorney from each of the said complainants authorizing the filing in this court of the said bill.

A. R. LAWTON,
W. S. CHISOLM,
Solicitors for Wm. N. Habersham & Wm. Hunter, Exe'rs, &c.

And afterwards, to wit, on the 5th day of May, A. D. 1879, the following proceedings were had, to wit:

Demurrer of Wm. Neyle Habersham and William Hunter, executors.

The demurrer of Wm. Nyle Habersham and William Hunter, executors of the last will and testament of Mary Telfair, to the bill of complaint filed in the above-entitled cause.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of
61 complaint to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

That the said complainants have not, in and by their said bill, made or stated such a case as entitles them to any such discovery or relief as is thereby sought and prayed for, it appearing that the said complainants are seeking, in their character as heirs-at-law of the said Mary Telfair, deceased, to set aside various bequests and devises contained in her said last will and testament, upon the ground:

First. That she bequeathed her property to charity and died within ninety days after the execution of her will.

Second. That her said will was attested by subscribing witnesses who were incompetent because of their interest in the same.

Third. That all the legacies and devises contained in said will are inoperative, and more particularly those contained in the tenth, eleventh, twelfth, fourteenth, seventeenth, twenty-first, and twenty-third items thereof, because of the illegal conditions attached to the same.

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And on the other hand:

First. It does not appear from the said bill that the said complainants are the children, or that either of them was the husband of the said testatrix, Mary Telfair, with a right to complain under section 2419 of the code of Georgia that said will was executed within ninety days before her death.

Second. Nor does it appear that either of the subscribing witnesses had other interest in the said will than that of an individual member of a charitable or educational corporation in the devises and legacies contained in the tenth, eleventh, and fourteenth items, or any other interest than that which results from the ownership of property subject to taxation for the support of the poor in the devises and legacies contained in the twelfth, thirteenth, and twenty-first items of the said will; and the said interests are too indirect, consequential, and uncertain to disqualify such attesting witnesses under the laws of the State of Georgia.

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Third. It further appears from the said bill and its exhibits that the said will has already been admitted to probate; and the said averments that the said will was executed within ninety days before the death of the said testatrix, and was not properly attested, are averments of matters which cannot be set up to avoid special devises and legacies after the said will which contains them has been duly propounded and admitted to probate in a State court of competent jurisdiction.

Fourth. Because it appears that the gifts and bequests made in all other items of the will except the first (a devise to the original complainant, George Noble Jones himself), the tenth, eleventh, twelfth, and fourteenth, are bequests of personal property, which in no event would descend to the said complainants as heirs-at-law, unless the entire will or the residuary clause thereof be set aside, and that the said testatrix did not create absolute estates in the devises under the said tenth, eleventh, twelfth, and fourteenth items, but retained in her executors a reversionary title to the same, and disposed of such reversionary interest by the thirteenth and twenty-first items to the Savannah Female Orphan Asylum, and to her executors as residuary legatees in trust; it further appearing that said devises of said reversionary interests are legal and valid, and said devise's are parties competent to take and to hold the said property.

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Fifth. Nor further does it appear that the devise in trust contained in item fourteen of the said will is illegal, or for any reason void, and even if it did appear that the Georgia Historical Society is not now legally qualified, and cannot hereafter become legally qualified, to take and discharge the said trust, the truth of which pretence these defendants wholly deny, nevertheless the trust itself will not fail for want of a trustee, and for further cause of demurrer these defendants say that the said complainants have shown no interest in the property conveyed by said will, and no title to the relief which they pray, and for these and divers other errors and imperfections these defendants humbly demand the judgement of this honorable court, whether they shall be compelled to make any further or other answer

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to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed, with their reasonable costs in this behalf sustained.

A. R. LAWTON,
W. S. CHISOLM,
Solicitors for Executors of Will of Mary Telfair.

We do hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

A. R. LAWTON,
W. S. CHISOLM,
Solicitors for Executors of Will of Mary Telfair.

66 UNITED STATES OF AMERICA,
Southern district of Georgia:

Personally appeared one of the executors of the last will and testament of Mary Telfair, defendant, who deposes and says that the foregoing demurrer is not interposed for delay.

WM. HUNTER,
Executor Est. Mary Telfair.

Sworn to and subscribed before me this 5th day of May, A. D. 1879.
WILLARD P. WARD, *Clerk.*

And afterwards, to wit, on the 16th day of May, A. D. 1879, the following proceedings were had, to wit:

Order overruling demand for letters of attorney.

The solicitors for defendants having filed a demand for letters of attorney from complain'ts' solicitors, and subsequently filed their demurrer to the said bill of complaint, it is ordered that the said
67 rule demanding said letters of attorney be, and the same is, disallowed. May 16, 1879.

J. P. BRADLEY,
C. Justice.

And afterward, to wit, on the 20th day of May, A. D. 1879, the following proceedings were had, to wit:

Order setting down demurrer for argument.

The defendants having filed a demurrer in the above-stated case, ordered that the same be set down for a hearing on Monday, May 26th, 1879.

JOHN ERSKINE, *Judge.*

And afterwards, to wit, on the 27th day of May, A. D. 1879, the following proceedings were had, to wit:

Demurrer of Independent Presbyterian Church and Widows' Society of Savannah.

68 The demurrer of the Independent Presbyterian Church of Savannah and of the Widows' Society of Savannah, two of the defendants to the bill of complaint filed in the above-entitled cause.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show: That said complainants have not in and by their said bill made or stated such a case as entitles them to any such discovery or relief as is thereby sought and prayed for, and have shown no interest in the property conveyed by will of Mary Telfair, deceased, and no title to the relief which they pray.

Wherefore and for divers other good causes of demurrer appearing in the said bill, these defendants demur thereto and humbly demand the judgement of this court whether they shall be compelled to make
69 any further or other answer to the said bill; and pray to be hence dismissed with their costs and charges, in this behalf most wrongfully sustained.

I do certify that in my opinion the foregoing demurrer is well founded in point of law.

W. GRAYSON MANN,
Solicitor for Independent Presby. Church of Sav. and for Sav. Widows' Society.

Personally appeared before me James G. Mills, who, being duly sworn, says that he is the chairman of the board of trustees of the Independent Presbyterian Church of Savannah; that he has read the foregoing demurrer, and that the same is not interposed for delay.

J. G. MILLS.

WILLARD P. WARD, *Clerk.*

The foregoing is the demurrer of the defendant the Independent Presbyterian Church of Savannah, as witness the corporate seal of said church, attested by the chairman of its board of trustees, who is the custodian of said seal.
70 Attested:

J. G. MILLS. [SEAL.]
Chairman Board of Trustees Independent Presbyterian Church of Savannah.

Signed and attested in my presence this May 22nd, 1879.
WILLARD P. WARD, *Clerk.*

Personally appeared before me Mrs. J. W. Lathrop, who, being duly sworn, says that she is the first directress of the Savannah Widows' Society; that she has read the foregoing demurrer, and that the same is not interposed for delay.

MRS. J. W. LATHROP.

[SEAL.] WM. HARDEN,
U. S. Commissioner.

The foregoing is the demurrer of the Widows' Society of Savannah, as witness the corporate seal of said society, attested by the first directress of the same, who is the custodian of said seal.

71 MRS. J. W. LATHROP, [SEAL.]
First Directress of the Savannah Widows' Society.

Attested in my presence.

WM. HARDEN,
U. S. Commissioner.

And afterwards, to wit, on the 6th day of June, A. D. 1879, the following proceedings were had, to wit:

Order dismissing bill.

This cause came on be heard at this term on a demurrer to the bill, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the bill be dismissed, and that the complainants do pay all costs in the cause.

June 6th, 1879.

JOSEPH P. BRADLEY, *C. J.*

72 And afterwards, to wit, on the 5th day of June, A. D. eighteen hundred and seventy-nine, the following proceedings were had, to wit:

Application and order for appeal.

WALLACE S. JONES AND NOBLE JONES, executors of George Noble Jones, et al.,
vs.
WILLIAM N. HABERSHAM AND WILLIAM Hunter, executors of Mary Telfair, et al. } In equity.

All of the complainants in the above stated case being dissatisfied with the decree therein rendered, and as the amount involved, complainants right to which is denied by said decree, is for each complainant over five thousand dollars in value, complainants here make application for the allowance of an appeal to the Supreme Court of the United States, and here tender an appeal bond for costs in the sum of one thousand dollars, with Wallace S. Jones and Noble W.
73 Jones, executors, and T. S. Wayne, E. F. Neufville, and Rich. W. Woodbridge as bondsmen, and pray that said bond may be approved and said appeal allowed.

And complainants will ever pray, &c.

W. W. MONTGOMERY,
J. R. SAUSSY,
Sol'rs for Comp'ts.

Order.

It appearing to the court that the complainants in the above stated case are dissatisfied with the decree therein rendered, and have made an application to the Honorable Joseph Bradley, one of the justices of the Supreme Court, who tried said cause, for the allowance of an appeal to the Supreme Court of the United States, and having tendered an appeal bond for costs, with Wallace S. Jones & Noble W. Jones, executors, and T. S. Wayne, E. F. Neufville, and Rich'd. W. Woodbridge as bondsmen, in the sum of one thousand dollars,
74 which is hereby approved, it is ordered that said appeal be allowed.

In open court, June 5th, 1879.

JOSEPH BRADLEY, *C. J.*

And afterwards, to wit, on the 5th day of June, A. D. eighteen hundred and seventy-nine, the following proceedings were had, to wit:

Appeal bond.

WALLACE S. JONES AND NOBLE JONES, executors of George Noble Jones, et al.,
vs.
WILLIAM NEYLE HABERSHAM AND WILLIAM HUNTER, executors of Mary Telfair, et al.

Know all men by these presents that we, Wallace S. Jones and Noble W. Jones, executors, and T. S. Wayne, E. F. Neufville, and Rich'd W. Woodbridge, of the city of Savannah, and State of Georgia, are held and firmly bound unto William Neyle Habersham and
75 *and* William Hunter, as executors of Mary Telfair; the trustees of the Independent Presbyterian Church of Savannah; the Union Society of Savannah; the Widows' Society of Savannah; the Presbyterian Church of the city of Augusta; the Georgia Historical Society—the five last-named corporators under and by virtue of the laws of Georgia; Mrs. Virginia Gould, wife of William T. Gould, of Augusta, Georgia, in the sum of one thousand dollars, to be paid to said obligees, their executors, administrators, or successors. To which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this fifth day of June, 1879.

Whereas Wallace S. Jones and Noble Jones, as executors of George Noble Jones, William H. Harison, as executor of Mary G. Har-
76 ison, Alfred Cuthbert, and William R. Ritchie have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the United States circuit court for the southern district of Georgia, known as the fifth circuit court of the United States:

Now, therefore, the condition of this obligation is such that if the above-named Wallace S. Jones and Noble Jones, as executors of George Noble Jones, William H. Harison, as executor of Mary G. Harison, Alfred Cuthbert, and William A. Ritchie shall prosecute their said appeal to effect, and answer all costs, including just damages for delay if they fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

WALLACE S. JONES,
NOBLE W. JONES,
Executors,
Per J. R. SAUSSY, *Att'y.*
T. S. WAYNE.
E. F. NEUFVILLE.
RICH. W. WOODBRIDGE.

Sealed and delivered in presence of (the words including just damages for delay being first interlined).

77 The above bond is hereby approved. Done in open court, June 5th, 1879.

In open court, June, 5, 1879.

JOHN ERSKINE,
U. S. Judge.
JOSEPH P. BRADLEY,
C. J.

Afterwards, to wit, on the 13th day of June, A. D. eighteen hundred and seventy-seven, the following proceedings were had, to wit:

Appeal.

WALLACE S. JONES AND NOBLE JONES, executors of George Noble Jones, et al.,
vs.
WILLIAM N. HABERSHAM AND WILLIAM HUNTER, executors of Mary Telfair, et al.

To the honorable the Supreme Court of the United States:

The appeal of Wallace S. Jones and Noble Jones, as executors of George Noble Jones, William H. Harison, as executor of Mary G. Harrison, Alfred Cuthbert, and William A. Ritchie, the complain-
78 ants and appellants in the above stated case, respectfully sheweth, that upon the third day of , 1879, the said complainants filed their bill in the circuit court of the United States for the southern district of Georgia against William N. Habersham and William Hunter, as executors of Mary Telfair, the trustees of the Independent Presbyterian Church of Savannah.

The Union Society of Savannah, the Widows' Society of Savannah, the Presbyterian Church of the city of Augusta, the Georgia Historical Society, the five last named being corporators under and by virtue of the laws of Georgia, & Mrs. Virginia Gould, wife of William Gould, of Augusta, Georgia, for the purpose of getting a construction from the court of the will of said Mary Telfair, complainants setting forth in said bill that they were the heirs at law and representatives of heirs at law of said Mary Telfair, and that under a proper construction of said will all the property therein attempted to be bequeathed was the property of complainants, or if not all, certainly all embraced under the tenth, eleventh, twelfth, thirteenth, fourteenth, twenty-first, and twenty-
79 third items of said will, and prayed the court so to decree; that defendants filed a demurrer to said bill, and that on the pleadings so made up argument was had, and on the fifth day of June, 1879, a final decree was made and pronounced in the cause wherein it was in substance adjudged and decreed that the twenty-second item of said will (which will is attached as an exhibit to the bill in the cause) did not create a perpetuity in reference to each and all of the devises and bequests of said will, and that the tenth, eleventh, twelfth, fourteenth, twenty-first, and twenty-third items of the will were valid and could be executed; that the amount involved in said suit, and appellants' right to which has been decided against by said decree, is over five thousand dollars, and further that the interest of each appellant so decided against is over five thousand dollars; wherefore appellants appeal from the whole of said decree of said circuit court of the United States, and respectfully pray that the decree of the said circuit court and
80 bill, demurrer, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be

reversed and a decree made in accordance with the prayer of said bill, or such other decree as to the said Supreme Court shall seem just.

Dated June 9th, 1879.

CHARLES N. WEST,
Solicitor for Appellant.

W. W. MONTGOMERY,
J. R. SAUSSY, *Counsel.*

WALLACE S. JONES AND NOBLE JONES, executors of George Noble Jones, et al.,
and
WILLIAM N. HABERSHAM AND WILLIAM HUNTER, executors of Mary Telfair, et al.

SOUTHERN DISTRICT OF GEORGIA:

Joachim R. Saussy, one of the solicitors of the complainants, being sworn, deposes and says that on the thirteenth day of June, 1879, at Savannah, in said southern district of Georgia, he served a copy of the appeal filed in said cause with the clerk of the said circuit court
81 in and for said southern district of Georgia upon the Presbyterian Church of the city of Augusta, one of the appellants in said cause, by leaving said copy for said appellee in the clerk's office of the circuit court aforesaid. Also, on the same day deponent served Mrs. Virginia Gould, wife of William T. Gould, of Augusta, Georgia, and one of the appellers in said cause, with a copy of said appeal by leaving it for said appellee in the clerk's office of the the circuit court aforesaid.

J. R. SUASSY.

Sworn to and subscribed before me this 13th day of June, 1879.

WM. M. HEYWARD,
Deputy Clerk, U. S. Circuit Court, So. Dist. of Ga.

The following acknowledgement of service was filed:

Acknowledgement of Service.

Service of the within appeal acknowledged; copy and further notice waived. June 6th, 1879.

A. R. LAWTON,
One of the Solicitors of the Executors of Mary Telfair.
HEURNY R. JACKSON,
Pres'd't Geo. His. Society.
82 W. GRAYSON MANN,
Solicitor for Independent Presbyterian Church and the Widows' Society.
J. H. ESTILL,
Pres'd't Union Society.

83 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

I, Willard P. Ward, clerk of the fifth circuit court of the United States of America for the southern district of Georgia, do hereby certify that I have compared the writings annexed to this certificate, and

that they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the equity cause of Wallace and George Noble Jones, executors George N. Jones, deceased, et al., complainants, and Wm. N. Habersham and Wm. Hunter, ex'ors Mary Telfair, deceased, et al., lately pending in said circuit court, and appealed by the complainants to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at Savannah, in said district, this third day of October, A. D. 1879, and of the Independence of the United States the 104th.

[SEAL.] WILLARD P. WARD, *Clerk.*

84 And afterwards, to wit, on the 17th day of July, A. D. 1879, the following proceedings were had, to wit:

Assignment of error.

Supreme Court of the United States.

WALLACE S. JONES AND NOBLE W. JONES, executors of George N. Jones, et al., appellants,

vs.

WILLIAM N. HABERSHAM AND WILLIAM HUNTER, executors of Mary Telfair, et al., appellees.

That is to say—

WALLACE S. JONES AND NOBLE W. JONES, executors of George N. Jones, William H. Harrison, executor of Mary Harrison, Alfred Cuthbert, and William A. Ritchie, appellants,

vs.

WM. N. HABERSHAM AND WILLIAM HUN-

85 *Hun*ter, executors of Mary Telfair; the trustees of the Independent Presbyterian Church of the city of Savannah; the Union Society of Savannah; the Widows' Society of Savannah; the Presbyterian Church of the city of Augusta, and the Georgia Historical Society—the last five corporations under the laws of Georgia, and Virginia Gould, wife of William T. Gould, appellees.

Appeal of October term, in the year of our Lord eighteen hundred and seventy-nine.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capit*a*l, in the city of Washington, comes the said Wallace S. Jones and Noble W. Jones, executors of George N. Jones; William H. Harison, executor of Mary G. Harison, Alfred Cuthbert, and William A. Ritchie, by William W. Montgomery & J. R. Saussy,

their solicitors, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, in the judgment of the court, wherein it is held that no perpetuity is created by the twenty-
86 second item of the will as to all the legacies and devises contained therein. 2d. That the objection of uncertainty to the tenth item of the will cannot prevail. 3d. That the Independent Presbyterian Church, under its charter, could execute the trusts attempted to be imposed on it by the will—tenth item. 4th. That a court of chancery could supply a trustee in place of one incapacitated to take where the beneficiaries under the trust are too indefinite to file a bill in their own name for the purpose of enforcing the trust. 5th. That the conditions against alienation in the will did not invalidate the bequests to which they were attached, it manifestly appearing from the will that the bequests were not intended to take effect unless with the conditions, which conditions are void under the law of Georgia. 6th. That the bequest contained in the twelvth item of the will is for charitable purposes. 7th. That if the gift over contained in the thirteenth item is invalid, yet it cannot effect the bequests contained in the tenth, eleventh, and twelvth items; "if invalid the conditions are inoperative, and the property remains as at first given." 8th. That the Georgia
87 Historical Society could under its charter, execute the trust attempted to be conferred upon it by the fourteenth item of the will. 9th. That the twenty-first item is not void for uncertainty, nor the bequest too remote in point of time of taking effect. 10th. That the bequests in the twenty-third item were not too remote or uncertain, and the said Wallace S. Jones and Noble W. Jones, executors of George N. Jones, William H. Harison, executor of Mary G. Harrison, Alfred Cuthbert, and William Ritchie, pray that the decree aforesaid may be reversed, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the said decree.

W. W. MONTGOMERY,
J. R. SAUSSY,
CHAS. N. WEST,
Sol'rs for Appellants.

(Indorsement on cover:) No. 82. Wallace S. Jones & Noble Jones, as ex'ors of George Noble Jones, dec'd; William H. Harrison, as ex'or of Mary G. Harrison, dec'd; Anne M. Cuthbert, widow, & Alfred Cuthbert, jr., & Mary C. Cuthbert, children & heirs at law of Alfred Cuthbert, deceased, & William A. Ritchie, appellants, vs. William N. Habersham and William Hunter, ex'ors of Mary Telfair, dec'd, et al. S. Georgia, C. C. U. S. Filed 16th October, 1879.

ADDITION TO RECORD 82.

1 *Stipulation of counsel and addition to record.*

In the United States Supreme Court, October term, 1882.

WALLACE S. JONES AND NOBLE JONES, executors of George Noble Jones, deceased, et al., appellants,
vs.
WILLIAM N. HABERSHAM AND WILLIAM HUNTER, executors of Mary Telfair, deceased, et al., appellees.
} # 82.

It is agreed between counsel in the above-stated case that the opinion filed in said case in the circuit court is a part of the record thereof, and that a copy of said opinion may be filed in the Supreme Court of the United States with the same force and effect as if originally incorporated by the clerk of the circuit court with the transcript of the record in said case, counsel hereby consenting to the granting of such order by the Supreme Court at any time on or before the call of said case for hearing as may be necessary to effectuate this agreement and make a copy of said opinion a part of the record in said case.

Oct. 4th, 1882.

W. W. MONTGOMERY,
SALEM DUTCHER,
Solicitors for Appellants.
A. R. LAWTON,
W. S. CHISHOLM,
CHARLES C. JONES, JR.,
Solicitors for Appellees.

(Indorsed:) In the Supreme Court of the United States, October term, 1882. No. 82. Wallace S. Jones and Noble Jones, executors of George Noble Jones, deceased, et al., appellants, vs. William N. Habersham and William Hunter, executors of Mary Telfair, deceased, et al., appellees. Agreement.

(Stamped:) Office Supreme Court U. S. Filed Oct. 6, 1882. James H. McKenny, clerk.

2 UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

I, Hampton J. Herb, deputy clerk of the circuit court of the United States of America for the southern district of Georgia, do hereby certify

that the writing annexed to this certificate is a true copy of its respective original on file and remaining of record in my office, to wit, opinion in case of W. S. & N. W. Jones, ex's of G. N. Jones, compl'ts, & Wm. N. Habersham et al., ex's, def'ts.

In witness whereof I have caused the seal of the said court to be hereunto affixed, at the city of Savannah, in the southern district of Georgia, this eighth day of August, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundredth and seventh.

[SEAL.] HAMPTON J. HERB,
Deputy Clerk.

3 United States circuit court, southern district of Georgia. Before Bradley & Erskine, j. j. In equity.

WALLACE S. AND NOBLE W. JONES, EXECUTORS GEORGE N. JONES, et al.
vs.
WM. N. HABERSHAM AND WILLIAM HUNTER, executors Mary Telfair et al.
} On bill and demurrer.

W. W. Montgomery, J. R. Saussy, for complainants.
W. T. Chisholm, Mr. Mann, Gen. Lawton, for defendants.

Opinion of the court by Bradley, justice.—June 5th, 1879.

4 This is a bill filed by the heirs at law of Mary Telfair seeking to have the devises and bequests of her last will adjudged inoperative and void, and a resulting trust in all her estate declared in favor of said heirs, and that they may have a decree for their distributive shares thereof. The defendants demurred and the question now arises on the demurrer.

The will was made on the 2d day of June, 1875, when the testatrix was far advanced in years, and the probate thereof was strenuously contested, on various grounds, but was finally established on appeal by the supreme court of Georgia.

The testatrix was never married and had no relatives except collaterals in the third and fourth degrees. A great portion of her estate, which is alleged to have been of the value of $650,000, was given to charity.

A fundamental objection raised by the complainants to all the devises and bequests arises on the 22d item of the will, which is as follows:

"Twenty-second. It is my wish, and I hereby so direct, that none of the legacies, bequests, and devises in any of the clauses of this, my will, shall be executed or take effect until the building and other improvements on the lot on the corner of Gaston and Whitaker streets, and known as the 'Hodgson Memorial Hall,' which I have conveyed in trust to the Georgia Historical Society, shall be completed and entirely paid for out of my estate."

5 It is contended that this postponement of the execution and effect of the devises and bequests, violates the rule against perpetuities, and renders them inoperative and void. The bill alleges that the building

and other improvements referred to were in course of construction at the tir of the death of testatrix, but were not completed till many months thereafter, and whether yet entirely paid for, the complainants were not certainly informed.

If not paid for, it was the only debt known to the complainants existing against said estate.

The complainants concede the English rule to be that where there is an immediate gift to trustees for a general charity, but the particular application of the fund will not of necessity take effect within any assignable limit of time, and can never take effect at all except on the occurrence of events in their nature contingent and uncertain, the gift is valid, and the court will hold up the fund a reasonable time and await the happening of the contingency. Reference for this is made to the cases of the Att'y Gen. v. The Bishop of Chester, 1 Brown's Ch. Ca., 444, and to Att'y Gen. vs. Oglander, 3 Brown Ch. Ca., 166.

But the complainants' question whether this rule can be applied
6 in Georgia, and they contend that whether it can or cannot, there is no immediate gift of the property in the mean time before the contingency happens. The last clause of the will, it is true, after appointing executors of the will, makes them also "trustees under the provisions of the same," but it is contended that this does not operate as a devise to them of the real estate.

In considering this objection to the validity of the disposition of the will, it is to be observed, in the first place, that all the gifts therein contained are immediate in form. Thus the first item declares: "I hereby give, devise, and bequeath to George Noble Jones, son of the late Noble Wymberly Jones, all that full lot of land in the city of Savannah, &c." (going on to describe it), "to him and his heirs forever." The tenth item declares thus: "I hereby give, devise, and bequeath to the trustees of the Independent Presbyterian Church of the city of Savannah all that full lot of land, &c.," going on to describe the same and to declare the purposes for which the gift was made.

It seems to us, therefore, that the gift itself is not suspended upon the completion of the Hodgson Memorial Hall and the payment thereof, but only the execution and carrying into effect thereof.

Some of the gifts are pecuniary legacies.

7 If this view is correct, the gift of these legacies is not suspended, but only the payment thereof.

This seems to us to be the intent of the testatrix. No one can read the whole will and believe that the testatrix for one moment had in her mind the revocation or non-operation of the gifts themselves. The Memorial Hall was begun at the time the will was executed, and was so far constructed as to be completed within a few months afterwards. Its plan and extent must have been designed, and its cost must, within probable limits, have been anticipated. It was her desire that the executors and trustees should finish that building, and pay for it, before the other legacies should be paid, or the other donations carried into effect. If any unreasonable delay should occur in this behalf, of course it would be competent for any of the beneficiaries under the will to compel the trustees to proceed. But it being an obligation of her estate, incurred under her own directions, she wished it discharged before the other donations of her will should be carried out; and she is therefore emphatic on the subject.

8 There is reason in what the counsel for the defendants say, that this provision is in effect what the law of Georgia requires or allows in all cases. Section 2451 of the code declares that "all property, real and personal, in this State, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy." In other words, the payment of debts, and the fulfillment of obligations, are the first things to be executed, before the devises and bequests can be carried out, without the assent of the executors. The completion of this Memorial Hall was an obligation already incurred, and the will merely requires what the law virtually requires, or allows the executors to require in all cases.

Before proceeding further, it may be proper to cite the provisions of the code of Georgia on the subject of charities. The most important for the purposes of this case are the following:

§ 2468. A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done fails, from any
9 cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

§ 3155. Equity has jurisdiction to carry into effect the charitable bequest of a testator or founder or dower, where the same are definite and specific in their objects, and capable of being executed.

§ 3156. If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed.

§ 3157. This section specifies the subjects which are proper matters of charity for the jurisdiction of equity, corresponding nearly with the 43 Elizabeth.

By these provisions it will be seen that the law of charities is fully adopted in Georgia as far as is compatible with a free government where no royal prerogative is exercised.

We will now proceed to consider the objections which have been urged against the several charitable dispositions of the will.

10 The first of these is contained in the 10th item, and is a gift to the trustees of the Independent Presbyterian Church of the city of Savannah, of a certain lot of land in Savannah, with the building and improvements thereon, upon the following terms and conditions, to wit:

"First. That the trustees of the said Independent Church shall appropriate annually out of the rents and profits of said lot and improvements the sum of one thousand dollars to one or more Presbyterian or Congregational churches in the State of Georgia, in such destitute and needy localities, as the proper officers of said Independent Presbyterian Church may select, so as to promote the cause of religion among the poor and feeble churches of the State. Second. This gift and devise is made on the further condition that neither the trustees nor any other officers of said Independent Presbyterian Church will have or authorize any material alteration or change made in the pulpit or galleries of the present church edifice on the corner of Bull and South Broad streets, but will permit the same to remain substantially as they are, subject only to proper repairs and im-

provements; nor shall they sell or alien the lot on which the Sabbath school room of said church now stands, but shall hold the same to be improved in such manner as the trustees or pew-holders may direct. Third. Upon the further condition that the trustees of said Independent Presbyterian Church will keep in good order and have thoroughly cleaned up every spring and autumn my lot in the cemetery of Bonaventure, and that no interment or burial of any person shall ever take place either in the vault or within the enclosure of said lot; and for the purpose of having the same protected and cared for, I hereby give, devise, and bequeath my said lot in the Bonaventure Cemetery to the trustees of the Independent Presbyterian Church and their successors."

Various objections are raised to this gift, which will be considered in due order.

First. It is objected that it is void for uncertainty. This objection cannot prevail. The appropriation of a certain sum of money annually to one or more Presbyterian or Congregational churches in the State of
11 Georgia, in such destitute and needy localities as the trustees may select, so as to promote the cause of religion among the poor and feeble churches of the State, is a definite charitable object, much more so than hundreds of cases to be found in the books, which have been sustained.

The circumstances under which this opinion is prepared will not allow us to cite authorities for all the conclusions to which we have arrived, and therefore we shall content ourselves in most instances by simply stating them. We can only say that on the point under consideration, we have no doubt whatever. It requires but a slight knowledge of the law of charities to determine a question of this kind. Almost all charities describe their objects in general terms indicative of the particular kind of good to be effected thereby. When this is done, the charity is definite, although the particular objects are indefinite.

Another object declared in this item is, to keep in good order the testatrix's burying lot in the cemetery of Bonaventure. This is sufficiently definite, and is clearly authorized by the code of Georgia (Code, § 3157), although it was once held not to be a proper object of a charitable disposition. (Perry on Trusts, 706.) It is somewhat singular that it
12 should ever have been doubted, since the sanctity of tombs and other places of rest for the dead has always been an object of cherished regard since the establishment of Christianity, and received the peculiar care of the Roman law.

Secondly. Another objection made to this devise is, that it is accompanied with a condition which renders it void, namely, not to allow any alteration to be made in the pulpit or galleries of the church edifice of the trustee, nor to alien the lot on which the Sabbath-school room of said church stands, but to hold the same to be improved in such manner as the trustees or pew-holders may direct. So far as this condition is expressive of a direction to keep the pulpit or school-house in repair, it is a proper charity. So far as it may be construed as a condition against changing the form of the pulpit or alienating the land, if unlawful (which we do not affirm), it is nevertheless a condition subsequent, and cannot affect the charitable gift. It is a condition subsequent, because it relates to the future, after the gift is designed to take effect.

Third. The next objection is, that the trustee named being a cor-

13 poration of definite powers, not including that of holding property in trust for any other object than that connected with the church as a religious society, is incapable of receiving or administering the trust.

Supposing, for the sake of the argument, this to be true, still the charity will not be permitted to fail, but the court of chancery has full power to supply the want of a legal trustee. A definite charity is not allowed to fail for want of a trustee. The code expressly says, "A trust shall never fail for the want of a trustee" (§ 3195).

But we are inclined to think that the corporation may administer this trust. Every religious society or church has, from the very nature of the Christian religion and Christian institutions, a missionary vocation as old as the apostolic times; and it is not foreign to its purposes to extend aid to sister churches, or to promote the cause of Christianity, and especially of the particular form of Christianity which it professes in places of destitution or ignorance.

Another objection founded on the terms of the 13th item of the will will be considered hereafter.

The next gift is contained in the 11th item of the will, and is in

14 these words:

"Eleventh. I give and devise to the Union Society of Savannah all that lot or parcel of land in the city of Savannah on the north side of Bay street and at or near its intersection with Jefferson street extended or prolonged, known in the plan of said city as lot letter B, with the buildings and improvements thereon, but on the express condition that said society shall not sell or alienate said lot, but shall use and appropriate the rents and profits of the same for the support of the school and charities of said institution, without said lot being at any time liable for the debts or contracts of said society."

This gift is objected to on account of the condition against alienation, and because the Union Society has already a surplus of funds. The condition is nothing but a condition subsequent, and if void does not violate the gift. But we are not aware that a condition against alienation annexed to property devoted to charity has ever been held to be void. Charity property as a general thing cannot be alienated without the aid of the court of chancery. Its normal character is to be inalienable, and the condition only expresses that character. The court, notwithstanding the condition, would probably, if a proper case arose, make a decree allowing it to be alienated for the good of the charity. (See Perry vs. Carey, 24 How., 507, No. 5.)

The objection that the Union Society has more funds already than are needed or can be used for the purposes of its institution, is not sup-

15 ported by the allegations of the bill. The fact that a charitable society is well managed, and does not spend its entire income, but increases, as it may occasionally, its capital, is no evidence that its sphere of usefulness may not be greatly enlarged by an accession of new capital.

The twelfth item of the will is as follows:

"Twelfth. I give, devise, and bequeath to the Widows' Society of Savannah all that lot or parcel of land in Savannah, on the corner of President and West Broad streets, on which the improvements now consist of four brick tenement buildings, the rents and profits of the same to be appropriated to the benevolent purposes of said society; but this devise is made on condition the said Savannah Widows' Society shall not sell or alienate

said lot or improvements, nor hold the same subject to the debts, contracts, or liabilities of said society."

It is objected to this item that the gift is too general, being for benevolent purposes indefinitely, which are not necessarily charitable. But it is for the benevolent purposes of the donee, the Widows' Society of Savannah. By turning to the charter of this society, we find that it is incorporated and made a body politic, by the name and style of The Savannah Widows' Society, for the relief of indigent widows and orphans. This is sufficiently expressive of its charitable objects. But it is insisted that this declaration of the purpose and object of the society is only
16 a part of its name. This is doubtful. But if it were so, it would still be sufficient to show for what purpose the society was organized, and would lay the foundation of a bill or information in equity to prevent a diversion of its funds to any other purpose; we think the objection is untenable. The thirteenth item of the will contains a provision, which is applicable to the 10th, 11th, and 12th, which have been considered. It is as follows:

"Thirteenth. Should either one or more of the corporate bodies or institutions named in the preceding items of my will attempt to sell, alienate, or otherwise dispose of the property and estate therein devised, contrary to the terms and conditions therein set forth, or should there be any levy on the same to satisfy the debts of said corporation, then I hereby direct my executors or legal representatives to repossess and enter upon said property or estate as to which the conditions may be so broken or violated, and in that event I do hereby give and devise the said property so entered upon and repossessed unto the Savannah Female Orphan Asylum."

Here is a gift over of the property devised in the three previous items upon certain conditions subsequent. It is either valid or invalid. If valid, there is an end of the matter. If invalid, the conditions are inoperative, and the property remains as first given. This seems to us so clear that no further observation is required on the subject.

The next item is as follows:

17 "Fourteenth. I hereby give, devise, and bequeath to the Georgia Historical Society and its successors all that lot or parcel of land, with the buildings and improvements thereon, fronting on St. James Square, in the city of Savannah, and running back to Jefferson street, known in the plan of said city as lot letter 'N,' Heathcote ward, the same having been for many years past the residence of my family, together with all my books, papers, documents, pictures, statuary, and works of art, or having relation to art or science, and all the furniture of every description in the dwelling house and on the premises (except bedding and table service, such as china, crockery, glass, cutlery, silver, plate, and linen), and all fixtures and attachments to the same; to have and to hold the said lot and improvements, books, pictures, statuary, furniture, and fixtures to the said Georgia Historical Society and its successors, in special trust, to keep and preserve the same as a public edifice for a library and academy of arts and sciences, in which the books, pictures, and works of art herein bequeathed and such others as may be purchased out of the income, rents, and profits of the bequest hereinafter made for that purpose shall be permanently kept and cared for, to be open for the use of the public on such terms and under such reasonable regulations as the said Georgia Historical

Society may from time to time prescribe; but this devise and bequest is made upon condition that the Georgia Historical Society shall cause to be placed and kept over and against the front porch or entrance of the main building on said lot a marble slab or tablet, on which shall be cut or engraved the following words, to wit:

TELFAIR

ACADEMY OF ARTS AND SCIENCES,

the word 'Telfair' being in larger letters and occupying a separate line above the other words, and on the further condition that no part of the buildings shall ever be occupied as a private residence or rented out for money, and none but a janitor and such other persons as may be employed to manage and take care of the premises shall occupy or reside in or upon the same, and that no part of the same shall be used for public meetings or exhibitions, or for eating, drinking, or smoking, and that no part of the lot or improvements shall ever be sold, alienated, or encumbered, but the same shall be preserved for the purposes herein set forth. And it is my wish that whenever the walls of the building shall require renovating by paint or otherwise, the present color and design shall be adhered to as far as practicable. For the purpose of providing more effectually for the accomplishments of the objects contemplated in this item or clause of my will, I hereby give, devise, and bequeath to the Georgia Historical Society and its successors one thousand shares of the capital stock of the Augusta and Savannah Railroad of the State of Georgia, in special trust, to apply the dividends, income, rents, and profits arising from the same, to the repairs and maintenance of said buildings and premises, and the payment of all expenses attendant upon the management and care of the institution herein provided for, and then to apply the remaining income, rents, and profits in adding to the library, and such works of art and science as the proper officers of the Georgia Historical Society may select, and in the preservation and proper use of the same, so as to carry into effect in good faith the objects of this devise and bequest."

18 The charity indicated in the gift is a very meritorious one, and is authorized by the code (§ 3157) under the general class of "every educational purpose," which undoubtedly embraces public libraries. The principle objection to the gift is that the donee, the Georgia Historical Society, is incapable of taking it. But if this were true, as before stated, where the charity is definite, the court of chancery will provide a trustee, if none is named, or if the one named is incompetent to act.

It seems to us, however, that the gift to the Georgia Historial Society is not void. One ground of objection is that whilst a general power is given to the society to take and hold goods and lands, it is coupled with a proviso that the clear annual income of such real and personal estate shall not exceed the sum of five thousand dollars, whereas the bill states that the income of the society was already between three and four thousand dollars at the time of the gift, which will increase it seven thousand dollars more.

This, if the society accepted the trust, may have been cause of
19 forfeiting its charter; but the gift would none the less be vested

in it. To hold otherwise would be to render the society exempt from any inquiry on the subject at the suit of the State, for the answer would be, "We cannot hold more property than our charter allows, and therefore we do not."

Certain things are ultra vires of a corporation, but when it has the power to hold property and is forbidden to hold beyond a certain amount, the matter being one of degree merely, or of more and less, this is not a question of ultra vires, but of violation of its charter.

A contrary rule would involve many absurdities. Suppose a corporation has no more property than its charter allows, but by an enhancement of values it grows into an excess of that allowance, to what particular portion of its property does its title become void? Is the whole affected by the vice? The answer plainly is, the title to none of it becomes void, but the corporation may be amenable to the penalty of violating its charter. Individuals cannot call it in question, its tenants must continue to pay its rents, and its debtors their debts. The State alone has the right to
20 proceed against it. The State may or may not see fit to do so. It would depend on the circumstances of the case, the greatness of the excess, the causes which led to it, &c. The State may condone the offence. The legislature may relieve by enlarging its powers. In the present case the defendants contend that the Georgia Historical Society has been relieved by an amendment to its charter, passed in 1870, by which the proviso in question was repealed. The complainants insist that this amendment was unconstitutional, because the constitution of 1868 declares that "the general assembly shall have no power to grant corporate powers and privileges to private companies, except to banking and other business companies named, but shall prescribe by law the manner in which such powers shall be exercised by the courts." But "corporate powers and privileges" are powers and privileges which appertain to a corporation as such—its corporate franchises. It is not every power that a corporation has which is a corporate power.

The intent of this prohibition undoubtedly was to relieve the
21 legislature from applications to create private corporations of a certain class, such as benevolent, religious, literary, &c. It did not take away the power to make amendments to existing charters, nor intend to give that power to the courts. Suppose there had been a general law of mortmain forbidding all religious corporations to hold land, would the constitution prevent the legislature from repealing it? Yet, by repealing it, existing corporations would have a new accession of power—not of corporate power, but of power to hold property.

We think the amendment of 1870 was valid.

That a corporation may be a trustee, if not prohibited, has been frequently held. (Vidal v. Girard's Ex., 2 How., 188; Perrin v. Carey, 24 How., 367; McDonough v. Murdock, 15 How., 367; Colonization Soc. v. Gartrell, 23 Ga., 454.)

It may be a qualification that the object of the trust should be germain to or in harmony with the objects of the corporation. If this is true, what more appropriate existing corporation in Georgia could have been selected as trustee for the proposed library than the Georgia Historical Society? The presence of the library would greatly promote the objects of
22 its incorporation. The charter declares that it shall be construed

benignly and favorably for every beneficial purpose therein intended. In our judgment the gift in this case took effect in the society as trustee.

The other objections to this item, relating to the inscription to be placed on the building, &c., are not tenable. It is a laudable ambition to wish to transmit one's name to posterity by deeds of beneficence. The millionaire who leaves the world without doing anything for the benefit of society, or for the advancement of science, morality, or civilization, turns to dust and is forgotten; but he who employs a princely fortune in founding institutions for the alleviation of suffering or the elevation of his race erects a monument more noble, and generally more effectual to preserve his name, than the pyramids. Thousands of the wealthy and the noble in the early days of English civilization are deservedly forgotten, but the founders of the colleges in Oxford and Cambridge will be borne on the grateful memories of Englishmen as long as this empire
23 lasts. Harvard and Yale, in our own country, are pertinent examples of this truth.

The 17th item of the will gives $30,000 to the Presbyterian church of the city of Augusta, to be appropriated in building a commodious Sunday-school house and library on a portion of its lot. We do not remember that any particular objections were raised to this bequest.

The 21st item is as follows:

"Twenty-first. All the rest and residue of my estate, of whatever the same may consist, real, personal, and mixed, and wherever situated, I hereby give, devise, and bequeath to my executors hereinafter named, and to the survivor of them, and to the successors in this trust of said survivor, in trust, to use and appropriate the proceeds arising from the same to the building and erection and endowment of a hospital for females within the city of Savannah, on a permanent basis, into which sick and indigent females are to be admitted and cared for in such manner and on such terms as may be defined and prescribed by the trustees or directresses provided for in this item or clause in my will. The income, rents, and profits of such portion of the residuum of my estate as may not be expended in the building, erection, and furnishing said hospital shall be annually appropriated to the support and maintenance of the same. My desire and request is that a thoroughly convenient hospital, of moderate dimensions, suited to the wants of the city of Savannah, and capable of enlargement if necessity should require, may be built and erected, with no unnecessary display connected with it. And I do hereby nominate as the first trustees, managers, or directresses of said hospital, Mrs. Louisa F. Gilmer, Sarah Owens, Mary Elliott (formerly Habersham), Susan Mann, Florence Bourquin, Eva West, and Eliza Chisholm, all of Savannah, Georgia, and do request and instruct my executors to advise and consult with the ladies named as to the construction, arrangement, and furnishing of said hospital. It is further my wish and desire, and I do hereby request, that a suitable and proper act of incorporation for said hospital shall be obtained from such tribunal in the State of Georgia as may have jurisdiction in the premises, to be called and known as the "Telfair Hospital for Females," with the ladies above named, or such of them as may consent to serve, and such others as they may apply for to be associated with them as the first trustees, managers, or directresses under said act of incorporation, with power to fill any va-

cancies that occur in their number. And for the purpose of accomplishing the objects contemplated in this item or clause of my will, I do hereby authorize and empower my executors, or the survivor of them, to sell and convey all or any portion of the real estate, or any interest in the same, which I may have or be entitled to, and not given or devised in any of the previous items or clauses of this my will, using their discretion as to public or private sale, and as to whether and at what time such sales shall be made."

24 This is an important item, in consequence of the amount supposed to be given for the object indicated therein.

It is devoted to the building and endowment of a hospital for sick and indigent females within the city of Savannah. It is objected to for uncertainty as to its objects; for uncertainty as to the time when the hospital is to be built, and when the act of incorporation is to be obtained; for the impossibility of creating such an act under the constitution and laws of Georgia, and as being in violation of the rule against perpetuities, in that it gives the property ultimately to a corporation not yet in existence.

We do not think that any of these objections can prevail:

First. As to want of certainty in the objects. Surely when the testatrix says that the hospital is intended for females within the city of Savannah, into which sick and indigent females are to be admitted and cared for, she has said all that is necessary to make it a well-defined charity. It is to be a hospital; it is to be for females in Savannah; it is to be for sick and indigent females. What more could well be said to define

25 it? Very few charities are more definite.

As to the uncertainty of the time when the hospital is to be built, and when the act of incorporation is to be obtained, no one who has read the case of Inglis v. The Sailors' Snug Harbor, 3 Peters, 113, or the more recent case of Ould v. Washington Hospital, 95 U. S., 303, can have any doubt that the gift is good. Even if it cannot be carried out in the particular manner contemplated by the testatrix, the court can and will provide proper trustees to carry it out. This is fairly within the powers given by the code. But we cannot agree with the counsel for the complainants that the State of Georgia has, inadvertently or otherwise, deprived itself of the power of creating a charitable corporation. If the law authorizing the courts to grant charters is imperfect in this respect, it will no doubt be promptly amended when the defect is discovered. This is no greater or more remote contingency than that which intervened in any case where a gift to charity contemplates a future act of incorporation by the legislature. The fact that the property is directed to be ultimately conveyed to a corporation to be created creates no perpetuity. The

26 estate is given immediately to the executors and trustees, and the prosecution of the charity is to be carried on by them until the building shall be ready for delivery, and then handed over, with the fund to support it, to the corporation to be created, or, if none shall be created, to such trustees as the court may appoint. This creates no perpetuity, as has been decided in the cases referred to and many others that might be cited.

The 23d item which gives a thousand dollars to the first Christian church erected, or to be erected, in the village of Telfairville, in Burke County, or to such persons as may become trustees of the same, and a like sum to the Hodgson Institute, in the same village, are of the same character precisely,

so far as objected to, with the bequest in the case of the Att'y-Gen. v. The Bishop of Chester (1 Brown's, Ch. Ca. 444), which was approved by Lord Elden in Att'y-Gen. v. Parsons, 8 Vesey, 186.

In our judgment, the gifts of this will must be sustained. We should not have thought it necessary to go so much into detail, in examining the objections that have been raised, but for the ability and earnestness with which the several points were presented.

27 The bill must be dismissed with costs.

(Indorsed:) U. S. circuit court, so. dist. of Georgia. In equity. Wallace S. Jones & Noble W. Jones, executors of George Noble Jones, compl'ts, and Wm. N. Habersham & William Hunter, ex's et al. of Mary Telfair. Opinion.

28 UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

I, John Erskine, a judge of the circuit court of the United States for the southern district of Georgia, do hereby certify that Hampton J. Herb, who signed the within certificate, is, and was at the time of signing the same, a deputy clerk of the circuit court of the United States for the southern district of Georgia; that full faith and credit ought to be given to his acts and attestations given as such, and that his said certificate and authentication of the foregoing transcript is in due form.

In witness whereof I have hereto set my hand this eighth day of August, in the year of our Lord one thousand eight hundred and eighty-two.

J. ERSKINE,
Judge of the Circuit Court of said District.

UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

I, Hampton J. Herb, deputy clerk of the circuit court of the United States for the southern district of Georgia, do hereby certify that the honorable John Erskine, who signed the above certificate, is, and was at the time of signing the same, a judge of the circuit court of the United States for the southern district of Georgia, duly commissioned and qualified; and that full faith and credit ought to be given to his acts and attestations given as such.

In witness whereof I have hereto set my hand and the seal of said court this eighth day of August, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] HAMPTON J. HERB,
Deputy Clerk of the Court of said District.

(Indorsed:) No. 82. U. S. Supreme C't. October term, 1882. Wallace S. & Noble W. Jones, ex'rs, Geo. N. Jones et al., appellees vs. Wm. N. Habersham & Wm. Hunter, ex'rs Mary Telfair, et al., appellees. Opinion of circuit court. Stipulation of counsel & addition to record. Filed 6th Oct., 1882.

(Stamp:) Office Supreme Court U. S. Filed Oct. 6, 1882. James H. McKenney, clerk.

17-174

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

FROM THE FIFTH CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA.

WALLACE S. AND NOBLE W. JONES,
EX'RS OF GEO. NOBLE JONES, *et al.*,
APPELLANTS,

VS.

WM. N. HABERSHAM AND WM. HUNTER,
EX'RS MARY TELFAIR, *et al.*,
APPELLEES.

IN EQUITY.

BRIEF FOR APPELLANTS.

W. W. MONTGOMERY,
SOLICITOR FOR APPELLANTS.

WALLACE S. AND NOBLE W. JONES,
Ex'rs. of Geo. Noble Jones, *et al.*,
vs.
WM. N. HABERSHAM AND Wm. HUNTER, Ex'rs. Mary Telfair, *et al.*

Appeal from Fifth Circuit Court for the Southern District of Georgia.

STATEMENT.

This case comes before the Court upon a bill filed by complainants as heirs at law and next of kin of Mary Telfair, a maiden lady, against her executors, devisees and legatees, (among them certain charitable corporations, and one set of persons not incorporated, nor even associated together for any purpose, but whom the testatrix requests to incorporate themselves for charitable purposes mentioned in the 21st item of her will) to set aside as inoperative, in whole or in part, the legacies and devises.

The bill alleges that Testatrix died June 2d, 1875, and attaches a copy of her will; that complainants, with Mary E. Thompson, of Connecticut, are Testratrix's only heirs and next of kin. The will is dated June 1st, the day preceding the death of Testatrix, and disposes of her whole estate, the appraised value of which is alleged to be $654,000. The bill charges that all the devises and legacies are inoperative:

1st. Because the law against perpetuities is attempted to be violated.

2d. That the charities fail, because the charity devisees have no power to take.

3d. That the Testatrix having died within ninety days from the execution of her will, the charitable bequests and devises fail.

4th. Because some of the charities named are too indefinite and uncertain.

5th. Because certain of the devises are founded on illegal conditions, and no intention to give appears except as coupled with the conditions.

The bill further alleges that the Georgia Historical Society, the devisee under the 14th item, is prohibited by its charter from receiving more than $5,000 income; that it already has an income of between $3,000 and $4,000; that the devise would increase its income some $7,000 more; that the R. R. Company, 1000 shares of whose stock is left to the Georgia Historical Society, is perpetually leased to the Central R. R. of Ga. and rent reserved only. A copy of the lease is attached.

These shares, the bill claims, lapse and go to the heirs.

The bill further alleges that Hodgson Memorial Hall, which the will requires to be "completed and entirely paid for" before which time "none of the legacies, bequests and devises in any of the clauses in this, my will, shall be executed or take effect," was not completed for many months after the death of Testatrix, and whether yet paid for, complainants are not informed.

The bill further alleges that there are no debts for the Executors to pay.

The bill also alleges that it is brought in behalf of Mary E. Thompson, the only co-heir with complainants, if she chooses to unite with complainants and bear her *pro rata* of expenses.

It also states that the residuary clause undertakes to dispose of some $300,000; and that the proposed residuary legatees, under the 21st item

of the will, were not associated together in any character, corporate or incorporate, at the death of Testatrix or at the execution of the will.

The bill prays that all devises and legacies may be declared to be inoperative and void, and a resulting trust declared for the heirs, &c., and for general relief.

To this bill a demurrer was filed and sustained, and the bill dismissed.

QUESTIONS INVOLVED.

1. Are not all the legacies and devises void, because they are obnoxious to the law against perpetuities?

2. Are not all the charitable bequests void, because the legatees and devisees have no chartered power to take; or inoperative, because Testatrix died within 90 days from the execution of her will?

3. Is not the devise in the tenth item void—1st. For indefiniteness; 2d. Because it is coupled with a trust requiring the exercise of *ultra vires* powers on the part of the corporation devisee; and, 3d. Because it is given upon certain illegal conditions, and the intention expressed that the devisee is to take upon those conditions, "and not otherwise?"

4. Are not the eleventh and twelfth items void for the 3rd reason given for avoidance of the tenth?

5. Is not the twelfth item void for the reason that it is given to "benevolent" and not charitable purposes?

6. Is not the thirteenth item void, because it contravenes the law against perpetuities?

7. Is not the fourteenth item void, because the trust attempted to be conferred upon the corporation devisee is foreign to the purposes of its charter, and the amount devised more than the devisee can receive under its charter?

8. Is not the seventeenth item void, for perpetuity and want of power to take in the legatee?

9. Is not the twenty-first item void—1st. For perpetuity; 2d. For indefiniteness; 3rd. For want of power in devisees to take?

10. Is not twenty-third item void, for perpetuity and indefiniteness?

11. Can a charity be enforced in Georgia where there are no trustees, or the trustees are incapable of taking, and there are no beneficiaries sufficiently certain to maintain a suit for the enforcement of the charity?

12. If one or more of the legacies lapse—not devises, for a lapsed devise goes to the heir—do such legacies fall into the residuum (if the residuary clause be maintained) or go to the next of kin?

13. Is the amendment to the charter of the Georgia Historical Society (one of the corporation devisees) passed by the Legislature in 1870, valid? And if so, can the Society take the devise under fourteenth item?

ASSIGNMENT OF ERRORS.

WALLACE S. JONES AND NOBLE W. JONES, Ex'rs. of GEORGE N. JONES, *et al*, APPELLANTS,
vs.
WILLIAM N. HABERSHAM AND WILLIAM HUNTER, Ex'rs. of MARY TELFAIR, *et al*, APPELLEES. THAT IS TO SAY.

Supreme Court of the United States.

Wallace S. Jones and Noble W. Jones, Executors of George N. Jones, William H. Harison, Executor of Mary G. Harison, Alfred Cuthbert and William A. Ritchie, Appellants,

vs.

William N. Habersham and William Hunter, Executors of Mary Telfair, the Trustees of the Independent Presbyterian Church, of the city of Savannah; the Union Society, of Savannah; the Widows' Society, of Savannah; the Presbyterian Church, of the City of Augusta; and the Georgia Historical Society—the last five corporations under the laws of Georgia—and Virginia Gould, wife of William T. Gould, Appellees.

Appeal of October term, in the year of our Lord, Eighteen Hundred and Seventy-nine.

Afterwards, to-wit: On the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Wallace S. Jones and Noble W. Jones, Executors of George N. Jones, William H. Harison, Executor of Mary G. Harison, Alfred Cuthbert and William A. Ritchie, by William W. Montgomery and J. R. Saussy, their solicitors, and say in the record and proceedings aforesaid, there is manifest error in this, to-wit:

1st. In the judgment of the Court, wherein it is held that no perpetuity is created by the twenty-second item of the will as to all the legacies and devises contained therein.

2d. That the objection of uncertainty to the tenth item to the will cannot prevail.

3d. That the Independent Presbyterian Church, under its charter, could execute the trusts attempted to be imposed on it by the will—tenth item.

4th. That a Court of Chancery could supply a trustee in place of one incapacitated to take, where the beneficiaries under the trust are too indefinite to file a bill in their own name for the purpose of enforcing the trust.

5th. That the conditions against alienation in the will did not invalidate the bequests to which they were attached. It manifestly appearing from the will that the bequests were not intended to take effect unless with the conditions, which conditions are void under the laws of Georgia.

6th. That the bequest contained in the twelfth item of the will is for charitable purposes.

7th. That if the gift over contained in the thirteenth item is invalid, yet it cannot affect the bequests contained in the tenth, eleventh and twelfth items—"if invalid, the conditions are inoperative and the property remains as at first given."

8th. That the Georgia Historical Society could, under its charter, execute the trust attempted to be conferred upon it by the fourteenth item of the will.

9th. That the twenty-first item is not void for uncertainty, nor the bequest too remote in point of time of taking effect.

10th. That the bequests in the twenty-third item were not too remote or uncertain.

And the said Wallace S. Jones, and Noble W. Jones, Executors of George N. Jones; William H. Harison, Executor of Mary G. Harison; Alfred Cuthbert, and William A. Ritchie, pray that the decree aforesaid may be reversed, annulled and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the said decree.

W. W. MONTGOMERY,
J. R. SAUSSY,
CHAS. N. WEST,
Solicitors for Appellants.

11th. That the corporations, created or to be created, can take the property bequeathed and devised to them.

12th. That the amendment to the charter of the Georgia Historical Society, passed by the Georgia Legislature in 1870, is a valid amendment.

13th. That the gifts in the will must be sustained.

Said judgment is also appealed from—

14th. Because the Court erred in not holding the charitable devises and bequests inoperative by reason of the fact that the Testatrix died within ninety days after the execution of her will.

And for these additional reasons complainants pray a reversal of the decree as aforesaid.

W. W. MONTGOMERY,
J. R. SAUSSY,
C. N. WEST,
Solicitors for Appellants,

The following is all the Statute law of Georgia upon the subject of charities material to be considered:

1st. From the Code of 1873:

§1677. *Academies and churches, how incorporated.* [It shall be lawful for the several Superior Courts, in the several counties of this State, during the regular sessions of said Courts, upon the petition of five discrete and proper persons, to be judged of by said Courts, setting forth the fact that a regular academy or church has been erected in said county, and asking corporate authority to enforce good order, look after the interest of said academy, receive donations of lands, and look after the general interest of said institution, to grant such persons such authority, (not inconsistent with the laws of this State.) Such proceedings to be recorded on the minutes of said Courts, and to remain of force twenty years.]—Acts of 1872, p. 23.

§2343. *Conveyance to churches, etc., confirmed.* [All deeds of conveyance heretofore made, and which may hereafter be made to any person or persons, for any lots of land within this State, to any church or religious society, or to trustees for the use of such church or religious society, for the purpose of erecting churches or meeting-houses, are, and shall be deemed and taken to be good and valid, and available in law for the intents, uses and purposes contained in said deeds of conveyance; and all lots of land so conveyed shall be fully and absolutely vested in such church or religious society, or in their respective trustees, for the uses and purposes in said deed expressed; to be holden to them, or their trustees, for their use by succession, according to the mode of church government, or

rules of discipline exercised by such churches or religious societies respectively.]—Acts of 1805, C. p. 899.

§2344. *Trustees, to whom subject* [All trustees to whom conveyances are or shall be made, for the purposes expressed in the preceding section, shall be subject to the authority of the church or religious society for which they hold the same in trust, and may be expelled from said trust by such church or society, according to the form of government or rules of discipline by which they may be governed.]—Acts of 1805, C. p. 899.

§2345. *Vacancies, how filled.* [Every church or religious society shall be, and are hereby authorized and empowered to fill up all vacancies which may happen in said trusts by death, removal, expulsion, or otherwise; and when any vacancy shall be filled up the same shall be certified under the hand or hands of the person or persons presiding in the said society, and according to the form of government or discipline practiced by said church or society, which certificate shall express the name of the person appointed to fill the vacancy, and the name of the person in whose place he shall be appointed; and the said certificate being received [recorded] in the office of the clerk of the Superior Court of the county in which the land lies, the person so appointed to fill such vacancy shall be as fully vested with such trust as if a party to and named in the original deed.]—Acts of 1805, C. p. 899.

§2346. *The three preceding sections construed.* [The three preceding sections shall be so construed as to apply to all societies, whether social, charitable, secret, masonic, or by whatever name they may be called, and all criminal laws in force on the 5th of March, 1856, for the protection of religious societies, shall be so construed as to apply to all societies, by whatever name they may be called.]—Acts of 1855-56, p. 272.

§2347. *Societies incorporated.* [Said societies, in their distinct and proper names, by their trustees or officers, shall be entitled and authorized to receive, by purchase, gift, or bequest, all property, both personal and real, and they shall be capable in law of suing and being sued, pleading and being impleaded, contracting and being contracted with; and they are hereby made bodies politic and corporate for the purposes named, when any of the said societies shall have entered their names as trustees or officers of any such societies, for the purposes herein specified, and they shall be capable in law of defending and being defended, and entitled to all the benefits of the three preceding sections before mentioned; *Provided*, That the said societies shall have recorded the name, style and objects of their association, as prescribed by laws in force on the said 5th of March, 1856.]—Acts of 1855-56, p. 272.

§2419. (2384.) *Charitable devises.* No person leaving a wife or child, or descendants of child, shall, by will, devise more than one-third of his estate to any charitable, religious, educational, or civil institution to the exclusion of such wife or child; and in all cases the will containing such devise shall be executed at least ninety days before the death of the testator, or such devise shall be void.

§2468. (2432.) *Bequest to charity.* A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done fails from any cause, a Court of Chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

§3155. (3098.) *Charitable bequest.* Equity has jurisdiction to carry into effect the charitable bequest of a testator, or founder, or donor, where

the same are definite and specific in their objects, and capable of being executed.

§3156. (3099.) *Cy pres.* If the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the Court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed.

§3157. (3100.) *Subjects of charity.* The following subjects are proper matters of charity for the jurisdiction of equity:

1. The relief of aged, impotent, diseased, or poor people.
2. Every educational purpose.
3. Provisions for religious instruction or worship.
4. For the construction or repair of public works, or highways, or other public conveniences.
5. The promotion of any craft or persons engaging therein.
6. For the redemption or relief of prisoners or captives.
7. For the improvement or repair of burying grounds or tombstones.
8. Other similar subjects, having for their object the relief of human suffering, or the promotion of human civilization.

§3158. (3101.) *Right of supervision.* A charity once inaugurated is always subject to the supervision and direction of a Court of equity, to render effectual its purpose and object.

§3159. (3102.) *What is irreligious.* Nothing shall be deemed religious in its character which affirms doctrines licentious in their tendency, or inconsistent with the peace and safety of the State.

§3160. (3103.) *Extraneous evidence* If the terms of the bequest or deed are obscure, doubtful or equivocal, other evidence may be looked to ascertain the sense in which particular expressions are used, but not to make definite that which in itself is too indefinite for execution.

The title to act of 1856 (Code 2346-7) reads thus:

"An Act to protect and to confer upon charitable Societies certain privileges, and to make them bodies corporate and politic, (and for purposes of curtailing legislation.)" Acts of 1855-6, p. 272.

2d. From T. R. R. Cobb's Digest, page 542:

An Act to point out the manner of creating certain Corporations, to define their rights and privileges, and to provide a mode of changing the names of individuals.—Assented to Dec. 28, 1843. Pam. 108.

283. SEC. I. *Be it enacted.* That when the persons interested shall desire to have any church, camp-ground, academy, school, volunteer, military company, manufacturing company, trading company, ice company, fire company, theatre company, or hotel company, bridge and ferry company incorporated, they shall petition in writing the Superior or Inferior Court of the county where such association may have been formed, or may desire to transact business for that purpose, setting forth the object of their association and the privilege they desire to exercise, together with the name and style by which they desire to be incorporated, and said Court shall pass a rule or order directing said petition to be entered of record on the minutes of said Court.

284. SEC. II. When such rule or order is passed, and said petition is entered of record, the said companies or associations shall have power respectively, under and by the name designated in their petition, to have and use a common seal, to contract and be contracted with, to sue and be sued, to answer and be answered unto, in any Court of Law or Equity, to appoint such officers as they may deem necessary, and to make such rules and regulations as they may think proper for their own government, not contrary to the laws of this State; but shall make no contracts or pur-

chase, or hold any property of any kind, except such as may be absolutely necessary to carry into effect the object of their incorporation. Nothing herein contained shall be so construed as to confer banking or insurance privileges on any company or association herein enumerated; and the individual members of such manufacturing, trading, theatre, ice, and hotel companies, shall be bound for the eventual payment of all the contracts of said companies as in case of partnership.

285. SEC. III. No company or association shall be incorporated under this Act for a longer period than fourteen years, but the same may be renewed whenever necessary, according to the provisions of the first section of this Act.

By Act of Dec. 29th, 1845, (T. R. R. Cobb's Digest, 543) it was enacted, "That the provisions of said Act, (Act of 1843) so far as the same relates to corporations be and the same are hereby extended to all associations and corporations whatsoever, except banks and insurance companies."

The Acts of 1843 and 1845 appear in the Code as §1676.

3rd. From the Acts of 1878-9, p. 62:

An Act to repeal section 1677 of the Code, and in lieu thereof to provide for the granting and amending of charters for schools, academies, colleges and churches.

SECTION I. *Be it enacted by the General Assembly of the State of Georgia*, That section 1677 of the Code, providing for the incorporation of academies and churches by the courts, be repealed, and in lieu thereof, that the following be established: The Superior Court, upon the petition of five discreet and proper persons, showing that a school, academy, college, or church, has been, or is about to be, established in the county where such court is sitting, and asking for corporate authority to enforce good order, receive donations, make purchases, and effect alienations of realty, or personalty, not for purposes of trade and profit, but for promoting the general design of such institution, and to look after the general interests of such an establishment, may grant to such persons and their legal successors, such corporate powers as may be suitable to their enterprise, and not inconsistent with the laws of the State, nor violative of private rights; the charter so granted to remain of force twenty years, unless sooner revoked by law, and upon petition by the corporators, or their legal successors in charge of any such institution, however and whenever incorporated, the Superior Court of the county where the same is located, shall have power to amend the charter thereof in any way prayed for; *provided*, the same is not contrary to the laws of the State, nor violative of private rights.

SEC. II. *Be it further enacted by the authority aforesaid*, That the costs of recording such proceedings on the minutes shall be paid by the petitioners, and a certified copy of the same, under the seal of the court, shall be sufficient evidence in any case, of the corporate powers and privileges so granted.

SEC. III. *Be it further enacted*, That all laws and parts of laws in conflict with the provisions of this Act be, and the same are hereby, repealed.

Approved Dec. 16, 1878.

This last Act is made applicable to "library and other literary, charitable or social organizations," by Act of Oct. 13, 1879. Acts of 1878-9, p. 166.

I.

In support of the affirmative of the first question, the 22d item of the will is relied on. Record, p. 12.

An executory devise by the terms of which it is possible that it may not "take effect" (these words are at once the language of the law and of the will) within a life, or lives, in being and twenty-one years and a fraction is void.

Lewis on Perpetuities, chapter xix, p. 478 (L. L. ed., 1846); 2 Redfield on Wills (ed. 1876) 571–2–3–4.

It must necessarily take effect within the time.

Church in Brattle Square vs. Grant, 3rd Gray's Mass. R. 142—152–3–4–5–6.

Fosdick vs. Fosdick, 6th Allen, Mass. R. 43.

Welsh vs. Foster, 12th Mass. 97.

Atkins vs. Hiscocke, 1st Atk, 500.

Zeisweiss vs. James, 3rd Am. R. (63 Pen.) 558.

Schettler vs. Smith, 41st N. Y., 328, 1st, 2d and 4th head notes.

Commissioners of charitable donations and bequests vs. Baronness de Clifford. 1 Dru. & War. 245

Code, §2267. (2241.) *Perpetuities.* Limitations of estates may extend through any number of lives in being at the time when the limitations commence, and twenty-one years, and the usual period of gestation added thereafter. A limitation beyond that period the law terms a perpetuity, and forbids its creation. When an attempt is made to create a perpetuity, the law gives effect to the limitations not too remote, declaring the others void, and thereby vests the fee in the last taker under the legal limitations.

§2273. (2247.) *Definition.* An estate for years is one which is limited in its duration to a period fixed, or which may be made fixed and certain. If it be in lands, it passes as realty in this State. It may be for any number of years, so that the limitation be within the rule against perpetuities.

Perry on Trusts, §730.

This writer is most extreme in his views in favor of charities. Some of the authors cited by him to sustain sundry propositions laid down fail to do so, while others lay down the principle directly contrary to that they are cited to support. The Court is, therefore, asked to verify any doubtful proposition laid down by Mr. P. as law.

So of Mr. Redfield, who goes so far as to say that "the distinction in England between the class of cases administered in the Court of Chancery by its ordinary chancery powers, and that where the administration is referred by the King as *parens patriæ* to the Chancellor, is not important in this country, *since both classes of cases are here administered by the Courts of Chancery under their ordinary jurisdiction.*"

2d Redfield on Wills (ed. 1876) 518. If no trustees, he admits, it is administered by sign manual. There is nothing in the fact that the gift is to a charity, that will take the case out of the general rule.

Chamberlain vs. Brockett, L. R., 8th Cha., 206.

Ould vs. the Washington Hospital for Foundlings, 95 U. S. R., 303.

Commissioners of charitable donations and bequests vs. Baronness de Clifford, 1 Dru & War., 245.

Rose vs. Rose, 4th Abbot's N. Y. Court of App. Dec. 108.

Newark Meth. Epis. Church vs. Clark, 41st Mich., 730.

Jackson vs. Phillips, 14th Allen, 572, v.

The learned Judge delivering the opinion of the Circuit Court, not controverting the soundness of the principle invoked says, that under the will only the usufruct is postponed, the title vesting at once.

This might be conceded to be true at common law. (though some of the *auc.* cited, notably Welsh vs Foster, 12th Mass., 97, would indicate the contrary) yet, it is respectfully submitted, such is not the law of Georgia.

In that State such language as that used in the 22d item postpones the vesting of the title.

The following authorities, which were not brought to the attention of the Circuit Court, are relied on to sustain this position.

The law of Georgia differs from "the current of American cases" as to what words constitute a present vesting of an estate :

Welborn vs. Weaver, 17th Ga., 271, [5], [6], 276–7.

When property is to be *"delivered"* at a future time, title vests.

McGlawn vs. McGlawn, 17th Ga., 234.

See 10th Ga., 506 ; 28th Ga., 330.

Where the gift, grant, bequest or devise is intended "to take effect" at a future time, no present title passes.

Brewer vs. Baxter, 41st Ga., 212.

Bright vs. Adams, 51st Ga., 239.

Arnold vs. Arnold, 62d Ga., 627, [4.]

Code, §2395 reads:

§2395. (2360.) *Form.* No particular form of words is necessary to constitute a will ; and in all cases, to determine the character of an instrument, whether it is testamentary or not, the test is the intention of the maker, from the whole instrument, read in the light of the surrounding circumstances. If such intention be to convey a present estate, though the possession be postponed until after his death, the instrument is a deed ; if the intention be to convey an in terest, accruing and having effect only after his death, it is a will.

2. Jarm. on Wills (ed. 1880) 436, III.

As to the law in other States, see 1st Jarman on Wills (Am. ed. 1880) 35, N. 8.

Executory devise of personalty too remote. 2d Kelly, 116 [3.] 122, paragraph second.

Where the time is uncertain it is in the nature of a condition precedent, and the estate does not vest until the time expires.

May vs. Wood, 3rd Br. Ch. 472–3.

Atkins vs. Hickock, 1st Atk., 500.

Again, in Georgia, title to realty descends, *in all cases*, in the first instance to the heirs, subject to be divested in favor of a devisee by assent of the Executor. When could the Executors in this case assent? or "execute" the will?

Suppose "Hodgson Memorial Hall" had been destroyed by fire, or successful ejectment brought for it, before the Executors had completed and paid for the building and other improvements? "In all cases of doubt in regard to the construction of limitations, that is to be preferred which most favors the interest of the heir at law." Lewis, on p. 191.

After deciding as above the learned Judge who pronounced the opinion proceeds to say :

"No one can read the whole will and believe that the Testatrix, for one moment, had in her mind the revocation or non operation of the gifts themselves."

It is with great deference submitted that this has nothing to do with the application of the principle invoked. Doubtless there never was a

testator who had in his mind the non operation of his bequests arising from the fact that the language used by him created an estate which it was against the policy of the law to permit ; yet, many bequests have failed because so worded. The rule in Shelly's case—in the large majority of cases—defeats the manifest intention of testators.

So, in Georgia, the repeated attempts that are every day made to entail property by will are defeated by operation of law and the first taker acquires the fee.

Code, §2456, reads:

§2456. (2420.) *Intention of testator.* In the construction of all legacies, the Court will seek diligently for the intention of the testator, and give effect to the same, as far as it may be consistent with the rules of law ; and to this end the Court may transpose sentences or clauses, and change connecting conjunctions, or even supply omitted words in cases where the clause as it stands is unintelligible or inoperative, and the proof of intention is clear and unquestionable ; but if the clause as it stands may have effect, it shall be so construed, however well satisfied the Court may be of a different testamentary intention.

Executory devises, if too remote, fail in Georgia.

Code, §2469, reads:

§2469. (2433.) *Executory devise.* An executory devise is such a future disposition of property as would fail as a remainder by reason of some technical defect, but which if not violative of the policy of the law, will be sustained when found in a will.

Again, the opinion says there is force in the argument used by defendant's counsel, that the law of Georgia requires all debts to be paid before legacies and devises pass, and that the 22d item was, in effect, but a provision to do what the law required.

It is added; "The completion of this Memorial Hall was an obligation already incurred, and the will merely requires what the law virtually requires, or allows the executors to require in all cases."

Are not two very distinct things here confounded? Certainly the executors could go on with the contract to complete and pay for the work when done. But the material question here is—was the completion a thing that must necessarily take place, if at all, within the legal limit after the death of testatrix?

If the will had expressly said the titles were not to take effect until all debts were paid, the limitation would have been too remote.

Bagshaw vs. Spencer, 1st Fearne on Rem., 121-2-3.

It is true it is now held that a limitation after payment of debts is good, but not because the limitation is not too remote, if *the legal title* is so postponed, but because it is said that the entire legal estate passes immediately to the executor, or trustee, as the case may be, in trust, first for the payment of debts, and then *to the use* of the devisee or remainderman.

Lewis on Perpetuities, chap. xxx, sec. 1, p. 622, *et seq.*

The analogy drawn by the Circuit Court between such a case and the provisions of the 22d item of the will fails, for the following reason:

In the illustration, the legal title vests, as has been said, in the trustee. In Georgia, the legal title never vests in the executor.

Code of 1873, sections, 2246, 2483, 2451, reads thus:

§2246. (2221.) *Fee simple.* An absolute or fee simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate. Realty descends directly to the heirs, subject to be administered by the legal representative, if there be

one, for the payment of debts and the purposes of distribution. If there be a legal representative, the right to recover it is in him ; if there be none, the heirs may sue in their own name.

§2483. (2447.) *Descent to heirs.* Upon the death of the owner of any estate in realty, which estate survives him, the title vests immediately in his heirs at law. The title to all other property owned by him vests in the administrator of his estate for the benefit of the heirs and creditors.

§2451. (2415.) *Assets to pay debts.* All property, both real and personal, in this State, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy.

The heir, then, is the first taker and the gift to charity void, "not because the charity could not take at the remote period, but because it tends to create a perpetuity in the individual who is the first taker."

1st Jarm. on Wills, (ed. 1880) 505, n.

And the completion of the Hall is a thing entirely independent of the payment of the debt incurred for its erection. The one depends upon the action of the executors ; the other upon the performance of a contract by strangers.

See language intended to meet the rule in Edwin Forest's will. Pamphlet, p. 4.

If the rule be said to be technical, the reply is, let the Legislature correct it.

7th Wallace, 310-11.

II.

But if all the devises and legacies are not void for remoteness, then I submit—

1st. That none of the charitable bequests can take effect under the law of Georgia, as hereinbefore set forth.

2d. If this is not true, generally, it is true in this case, as Testatrix died within ninety days from the execution of her will.

1st. See statutes hereinbefore set forth.

Schley's Digest, ix-x, 33-49-163 188-205.

Beall vs. Ex'rs. of Fox, 4th Ga., 404.

In re Deveaux, 54th Ga., 673,

Hulsey vs. Gallagher, 61st Ga., 86.

Charter must contain express powers to take by bequest or devise.

McCarty vs. Orphan Asylum, &c., 9th Cow., 437.

Theological Seminary, &c., vs. Childs, 4th Paige, 419.

Sedgwick on S. & C. law (ed. 1857) 123-6-7.

The power of political corporations to take, whose duty it is to provide for the poor, is not here involved.

25th Ga., 430 ; 46th Ga., 96.

Charities in Georgia, then, must be *definite, certain* and *specific*, as contradistinguished from the indefinite, uncertain and general charities which have been upheld under the 43 Eliz. c. 4., whether by the Courts of Chancery, or by the Lord Chancellor, by virtue of the King's prerogative.

A comparison of the Statutes of Georgia with 43 Eliz. will make the above distinction conspicuously apparent.

Are, then, the English doctrines upon the subject of charitable uses to be pressed further than they would be in New York, Virginia, Indiana, Michigan, Maryland and the majority of the States of the Union? If not, see—

Kain vs. Gibboney, 101, U. S. R., 362.

The doctrine of *cy. pres.* applies, in Georgia, only to the *mode of giving effect* to the charity. e. g. A testator leaves $10,000 to be invested in a certain class of U. S. Bonds and the income paid to a named charitable institution. It so happens, at his death, all the bonds of the class mentioned have been called in. The Court will devise some approximate mode of giving effect to the charity. In England, if a testator leave a sum to found a Catholic Nunnery, the King gives effect to the charity *cy. pres.* (i. e., as near to the intention of the testator as practicable,) by bestowing the fund on the established church. It will hardly be contended that the doctrine of *cy. pres.* would be enforced to such an extent in Georgia. The codifyers were not authorized to make new law, but simply to codify the old : 37 Ga., 412 ; 42 Ga., 195-6. The first paragraph to the preface of the Code, citing the law providing for Commissioners to codify the laws, reads thus:

By an Act of the General Assembly, assented to 9th December, 1858, provision was made for the election of three Commissioners, "to prepare for the people of Georgia a Code, which should, as near as practicable, embrace, in a condensed form, the Laws of Georgia, whether derived from the Common Law, the Constitutions, the Statutes of the States, the Decisions of the Supreme Court, or the Statutes of England, of force in this State."

The Courts of Georgia adopt the doctrine of *cy. pres.* to this extent: "In order to preserve and effect something which the Court collects from the will to have been the paramount object of the testator, it rejects something else which is regarded as merely a subordinate purpose, namely : *The mode of carrying out that paramount intention.*"

Adams vs. Bass, 18 Ga., 135.

The cy. pres. doctrine, when pressed further than this becomes a prerogative power.

Vidal vs. Girard's Executors, 2 How, 195.

No Court in Georgia can exercise such powers.

Georgia Constitution of 1868.

Code, 5023.

Constitution of 1877, Art. I, Sec. I, Par. XIII.

And United States Courts cannot.

Fontain vs. Ravenel, 17 How, 393.

Note distinction between "specific" bequests to charity in Code, 3155, 3156, and "specific" (i, e. particular) "mode of execution" in the same sections and in 2468.

Specific bequests to charity are never enforced *cy. pres.* even in England.

Corbin vs. French, 4 Ves., 431.

Clark vs. Taylor, 21 E. L. & E. R., 308.

Att'y General vs. Goulding, 2 Bro. C. C., 428. See note at end of case.

Fontain vs Ravenel, 17 How, 387.

Cy. pres. not applicable to specific charities.

Att'y General vs Whitchurch, 3 Ves., 141.

Adams vs. Bass, 18 Ga., 130.

Only general charities are so enforced.

2 Redfield on Wills, (ed. 1876) 517-8.

Hence the 21st item (and so of any other making a bequest to charity) cannot be enforced *cy. pres.*

2d. If I am in error as to the incapacity of the charitable societies to take under their charters, then I submit, that the testatrix, having died within ninety days from the execution of her will, all the charitable devises and bequests lapse, and there being no residuary legatee under that assumption, the heirs and next of kin take.

Code, 2419. See section *supra.*

Reynolds vs. Bristow, 37 Ga., 283, and Wetter vs. Habersham, 60 Ga., 193, are relied on as settling a contrary doctrine.

The decision of the question was not necessary in either case, and was not before the Court, as the Court itself decides. See 60 Ga., 194, [9] [10.] Both cases went up to the Supreme Court *as a Court of Probate, on a caveat,* and the decision must have been the same, whatever way this question had been viewed by the Court; for decide it they had no right to do in either case.

See 37 Ga., 284–5. *Auc* cited by counsel for propounders in this case are to the effect that the decision below, upholding the factum of the will, is correct, in any event, whatever view the Court might take of the section of the Code invoked by caveators. No *auc,* upon the interpretation of the section, is cited on either side, or by the Court.

The sole question before the Court in each of the foregoing cases was, *devisavit vel non*; the *factum* alone was in issue.

The bequest in 37 Ga. was for "benevolent" purposes, and is, obviously, too indefinite to stand under the laws of Georgia, and yet neither point was called to the atttention of the Court.

Adye vs. Smith, 44 Connt., 60. (26 Am R., 424.)

Nor are the heirs, or U. S. S. Court concluded by these, not only *obiter* but extra-jurisdictional, *dicta* of the Supreme Probate Court of Georgia.

Pennsylvania has a similar statute (Act of April 25, 1855, §11) prescribing one month as the time which must elapse after the execution of the will to make a charitable bequest valid; under which it is held that a devise void by the statute, and a lapse of five years, concludes the heirs as to probate of the will, but not as to the validity of the devise.

Huppord's estate, 5 Phila., 219.

Is an obiter and extra-jurisdictional dictum more of an estoppel than a statutory bar, both relating to a subject cognate only to the issue before the Court?

The U. S. S. Court "cannot rest its judgment upon an opinion of a State Court concerning the construction of a statute of the State, if it was not necessary to construe the statute in order to decide the case in which the opinion was pronounced. Under such circumstances this Court must examine the question of construction, and decide it as seems to them right."

Carroll vs. Carroll's Lessee, 16 Howard, 275.

In speaking of the principle that the U. S. Courts will follow the construction placed by the State Courts on statutes of their respective States in Pease vs. Peck, 18 How., 595, the Court say: "Parties who, by the Constitution and laws of the U. S., have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the Court." And in that case, also, the decision of the State Court was disregarded.

Section 2419 of the Code of Georgia is taken, with slight alteration of verbiage, from 2 N. Y. Revised Statutes, 624–5 (ed 1859) which is as follows:

§6. "Any corporation formed under this Act shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars; *Provided*, no person leaving a wife, or child, or parent, shall devise or bequeath to such institution or corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator."

Does not the Georgia statute, much more certainly than the New York, embrace *all* devises? "Such devises," &c., as last used in the latter, might possibly admit of the construction given in 37 Ga. The ambiguity seems purposely avoided in the former. This New York statute is universally understood to include *all* charitable devises and legacies, whether testator left wife, child, or parent, or not.

Harris vs. Slaght, 46 Barbour, 470. See especially p. 504–5–6; 34 N. Y., 612; 33 N. Y., 114—118.

Lefevre vs. Lefevre, 59 N. Y., 434.

Perry on Trusts, §715.

Am. Encyclopœdia, "Mortmain,," by Cooley, C. J.

(Harris vs. Am. Bible Society, 4 Abb. Pr. N. S., 421; showing provision is not for benefit of relatives named alone, but may be taken advantage of by any one.)

The Pennsylvania statute is held to be a statute of Mortmain, and "a copy in principle of 9 Ga, II c., 36."

Davis's Appeal, Hausbests' Estate, 83 Penna. St., 348.

McLean vs. Wade, 41. Ib. 266.

Price vs. Maxwell, 28 Ib. 23.

In Pa. the Statute of Wills is not a Statute of Mortmain & devises & bequests to charitable uses are valid. Witmer's Appeal 72 Penn. (Pa. St.) 142.

III.

In support of the affirmative of the 3rd question involved (referring to 10th item) which is, in effect, that the tenth item is invalid, it is submitted that the Court below misapprehended the true nature of one of the objections urged: It was not that the illegal conditions attached to the gift rendered the devise void; but that, taken in connection with the thirteenth item, it is manifest that *the intention of the testatrix* was, that the bequest should not pass, *unless* the conditions were valid. The devise is "on the following terms and conditions, *and, not otherwise.*" Hence, if the conditions are void, the intention to give does not exist.

The conditions are void. The Code reads:

§2466. (2430.) *Conditions.* A condition *in terrorem* is void, unless there is a limitation over to some other person; in which event the latter takes. Conditions which are impossible, illegal, or against public policy, are void.

§2296. (2270.) *Repugnant condition.* A condition repugnant to the estate granted is void; so are conditions to do impossible or illegal acts, or which in themselves are contrary to the policy of the law.

Taylor vs. Sutton, 15 Ga., 109. [8.]

But such conditions must be taken into consideration, *in order to arrive at the intention of the testatrix.*

Heasman vs. Pearse, S. R. 7 ch. app. 275.

Mastrand vs. Moore, 52 N. Y. R. 12-18-21-23. Ib. 332.

The intention to give is inseparably connected with the condition. If the one fails, the other don't exist.

Levy vs. Levy, 33 N. Y., 97.

Van Kluck vs. Dutch Church, 20 Wend., 457.

But, under its charter, the devisee has no power to take:

AN ACT to incorporate the Presbyterian Church of the City of Savannah.

[*See Laws of Georgia,* 1801 *to* 1810, *Clayton's Compilation, pages* 325, 327.]

Whereas, a number of the inhabitants of the City of Savannah and County of Chatham have, by their memorial, represented to the Legislature, that on the 16th day of January, 1756, a certain lot of land, situate and being in the City of Savannah, and known by the letter K, was granted to James Powell, Robert Bolton, James Miller, Joseph Gibbons, William Gibbons, Benjamin Farley, William Wright, David Fox and John Fox, their heirs and assigns forever in trust nevertheless, and to the intent and purpose that a meeting-house or place of public worship for the service of Almighty God should be erected thereon, for the use of such persons as were then residing, or might thereafter reside, in the district of Savannah, as were professors of the doctrines of the Church of Scotland, agreeable to the Westminster Confession of Faith, with a proviso in the said grant contained that should such meeting-house or place of worship not be erected on the said lot within the time therein limited, then the said lot should revert to the grantors; that a meeting-house was built within the time limited, and the professors of the Presbyterian religion held, occupied and used the same as their place of public worship until the said meeting-house was destroyed by fire, in the month of November, 1796, and the said lot was afterwards disposed of by the then Trustees, on building leases, and hath ever since been held by the lessees; that in the year 180[illegible] the professors of the said Presbyterian religion were enabled, by subscription, to build a church on their other lot in the said City of Savannah, known by the letter Q, which is their present place of worship, and have prayed that a certain act of the Legislature, relative to the said Church be repealed, and that they, the said memorialists, may be made a body corporate, and Trustees appointed for the said Presbyterian Church or congregation.

SECTION 1. Be it therefore enacted by the Senate and House of Representatives, of the State of Georgia, in General Assembly met, and it is enacted by the authority of the same, That Thomas Newell, Charles Harris, Francis Courvoisie, John G. Williamson, John Scriven, Barrach Gibbons, Thomas F. Williams, Fingal F. Flyming and Benjamin Maurice, and their successors in office, be, and they are hereby declared to be a body corporate, by the name and style of "The Trustees of the Presbyterian Church of the City of Savannah."

SEC. 2. And be it further enacted, That the said Trustees and their successors in office, shall be invested with all manner of property, real and personal, all monies due, and to grow due, donations, gifts, grants, privileges and immunities whatsoever, which shall or may belong to the said Presbyterian Church, at the time of the passing of this act, or which shall, or may at any time, or times hereafter, be granted, given, conveyed or

transferred to them, or their successors in office, to have and to hold, the same to the said Trustees and their successors in office, to the only proper use, benefit and behoof of the said Church forever. And the said Trustees, and their successors in office, may have and use a common seal, and shall be, and they are hereby declared to be capable, by the name and style aforesaid, of suing and being sued, impleading and being impleaded in any court or courts of law or equity, and of using and taking all lawful and necessary ways and means for recovering or defending any property whatsoever, which the said Church may have, hold, claim or demand, or the rents, issues and profits thereof, or any part thereof.

SEC. 3. And be it further enacted, That the above named Trustees shall continue in office until Easter Monday, in one thousand eight hundred and eight, and that on the said Easter Monday, one thousand eight hundred and eight, annually thereafter, the members of the said Church shall convene at the said Church, between the hours of ten and two o'clock, and then and there elect, from among the said members, nine fit and discreet persons, as Trustees of the said Church, who shall be vested with all necessary powers, to carry the several purposes intended by this act into full effect.

SEC. 4. And be it further enacted, That nothing herein contained, shall be construed to vest in the said Trustees, any right or title, or color of right or title, to any estate or property whatsoever, real or personal, other than such as doth, or may rightfully or lawfully belong to the said Presbyterian Church or congregation, hereby made a body corporate.

SEC. 5. And be it further enacted, That it shall not be lawful for the said Trustees or their successors in office, at any time or times hereafter, to grant, bargain, sell, alien or convey any real estate whatsoever, belonging to the said Church, to any person or persons, under any pretence or upon any consideration whatsoever, so as to dispose of the fee simple thereof.

SEC. 6. And be it further enacted, That an act entitled "An Act to increase the funds of the Presbyterian Church in the City of Savannah," be, and the same is hereby repealed.

BENJAMIN WHITAKER,
Speaker of the House of Representatives.

EDWARD TELFAIR,
President of the Senate.

Assented to December 8, 1806.

JARED IRWIN, *Governor.*

McCarty vs. Orphan Asylum Society, 9 Cow., 437.
Theological Seminary of Auburn, vs Childs, 4 Paige, 419.
The devise is certainly void in part ; hence fails entirely.
Cherry vs. Mott, 1 Myl. & Cr., 123.
Fontaine vs. Ravenel, 17 How., 369.
Wheeler vs. Smith, 9 How., 55.
Attorney General vs. Davis, 9 Ves., 535.
Chapman vs Brown, 6 Ves., 404.

Assuming that this or some other item of the will fails to designate a trustee capable of taking, is it true that a Court of Chancery will appoint one?

Section 3195 of the Code is relied on to show that it will. It reads thus:

§3195. (3139.) *Want of trustee.* A trust shall never fail for the want of a trustee.

Such, doubtless, is the general rule ; but is not this the exception:

Where there is no trustee of a charity appointed, or, if appointed, the trustee is incapable of taking, or dies before acting, and the beneficiaries are too uncertain to sue, the charity can only be enforced in England by the King, as *parens patriæ*, and the trust must, therefore, in America, result for the benefit of the next of kin, or heirs.

Att'y General vs. Herrick, Amb., 713. 1 Tamlin, 32. 7 Ves., 74–5, 83.

Ray vs. Adams, 3 Myl. & Keen, 237. 24 How., 502, line 24, &c.

Baptist Association vs. Hart, 4 Wheat 1.

Downing vs. Marshall, 23 N. Y., 382. Ib. 366. 33 N. Y., 120.

2 Redf. on Wills (ed. 1876) 548-9.

§72. *New vs. Bonaker*, 4 *L. R. Eq.*, 655

Starkweather vs. Am. Bible Society, 72 Ill., 50. (22 Am. R. 140.)

A head note in Vidal vs. Girard's Ex'rs., 2 How., is contra, but obiter, and the Supreme Court return to 4 Wheaton, in 9 How., 55, and in Fontaine vs. Ravenel, 17 How., 365-6, 369, 383-4-5-6-7-8, 397-8, and in Perin vs. Carey, 24 How., p. 502.

See, also, Zeisweiss vs. James, 63 Penn. State R., 465 (3 Am. R., 558) showing obiter head note in Vidal vs. Girard's Ex'rs., 2 How., 195, to be erroneous as to the law of Penn.

Green vs. Allen, 5 Humphries, 170.

Ayres vs. Methodist Church, 3 Sandf., 352.

Andrews vs. Bible Society, 4 Sandf., 156—178.

Beekman vs. Bonsors, 23 N. Y., 258—303-4. 18 Pick., 339.

Owens vs. Missionary Society, 14 N. Y., 280. (4 Kernan, 380.)

Grimes's Executors vs. Harman, 35 Indiana R., 198 (9 Am. R., 690 to 735) where nearly all the *auc.* on the point are collated.

See deductions from the *auc.*, p. 731, fifth proposition. P. 732, seventh proposition. P. 733-4, thirteenth proposition. Seventeenth proposition. Bascom vs. Albertson, 34 N. Y., 584.

Plain words of gift to one *capable of taking* necessary to disinherit heir. Pickering vs. Ld. Stamford, 2 Ves., p. 284, n. 6. Habergrum vs. Vincent, 2 Ves., p. 204.

And the Supreme Court of Georgia have recognized this exception as the law of Georgia: 23 Ga., 455-6-7. 25 Ga., 420. The Court, in the last case cited, hold the Am. Colonization Society incapable of taking as trustee, but "the trust being legal, and the *cestui que trust capable of taking*, the chancellor will appoint the executor, or some other fit and proper person, to carry the trust into effect."

This principle was recognized as law in England in 1776, in Att'y General vs. Herrick, Ambler, 712, which was the latest decision on the subject when the Georgia "Adopting Act" was passed in 1784.

In 1803, where the trustee died before acting, the rule was, doubtingly, modified in England, and the charity was held capable of being effectuated by information.

Moggridge vs. Thackwell, 7 Ves., b. 36.

The next of kin, however, in that case, were endeavoring to set aside the charity altogether. No point was made as to how it was to be enforced, if held valid.

In Paice vs. Archbishop of Canterberry, 14 Ves., 364—70, Ld. Eldon, who decided Moggridge vs. Thackwell, seems to have returned to the earlier rulings. And in 1853 it would seem that such a charity was still to be carried out under the direction of the Crown.

In the matter of the Free Grammar School of Thomas Conyers, of Yarm, 10 Hare, Appendix 5.

Does the Code of Georgia, by omitting the qualification, abrogate the rule?

"The Code of Georgia is not to be construed as changing the old law, unless the change be very apparent, and it would be specially dangerous to take the definitions of the Code as absolutely accurate, and as excluding the common law definitions, unless it be plainly manifest that the intent was to make an exclusive and inclusive definition." 51 Ga., 269.

"The Code does not purport to give every qualification, or exception, which the wide field of the common law makes to the meaning of words and phrases." 42 Ga., 196.

The Constitution of Georgia, of 1863, after adopting the Code, adds: "And also so much of the common and statute laws of England, and of the statutes of Georgia, as were in force in this State on the 19th day of December, 1860, as are not superceded by said Code, though not embodied therein, except so much of the said several statutes, Code and laws as may be inconsistent with the supreme law herein recognized."

Code of 1873, §5145. Constitution of 1865, Art. V, §1, Par. 5.

The Constitution of 1877 is, in effect, the same. Art. XII, Par. III.

Gault vs. Wallis, 53 Ga., 675.

If the trust fail the heir takes.

Code, §2316, Par. 4, reads thus:

"4. Where a trust is expressly created, but no uses are declared, or are ineffectually declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs."

But it is said the trust is not foreign to the purposes of the charter.

It is submitted that it is much more so than was the trust to the purposes of the charter of the Am. Colonization Society in 23 Ga., 448. (See p. 459-1,) and yet that Society was held incapable of executing the trust.

See, also, Walker vs. Walker, 25 Ga., 420—428, [1.]

No power is conferred upon corporations, in Georgia, to become trustees for extra charter purposes.

Code, §1670 and 2362, reads as follows:

§1670. (1670.) *Corporation definition.* A corporation is an artificial person created by law for specific purposes, the limit of whose existence, powers and liabilities is fixed by the Act of incorporation, usually called its charter.

§2362. (2331.) *Nothing taken by implication.* A grantee of lands or a franchise, takes nothing by implication, but is confined to the terms of his charter; but every presumption is in favor of a grant.

IV.

Are not the illegal conditions attached to the eleventh and twelfth items so interwoven with the devises as to make the latter necessarily dependent upon the validity of the former?

The charter of the Union Society is found in Marbury & Crawford's Digest, 142, and confers power "to receive, take and apply all, or any, donations for the uses intended by said Society," i. e. "for the relief of distressed widows, and the schooling and maintaining poor children."

The date of the charter is August 14, 1786.

The charter of the Widow's Society is "for the relief of indigent widows and orphans," and empowers the Society "to hold, purchase, receive and enjoy lands and tenements, goods and chattels, and effects of what kind and nature soever, and the same to give, grant, alien and dispose of."

Acts of 1837, p. 220.

V.

Are "benevolent" purposes charitable purposes?

2 Story's Eq., §1156.
2 Roper on Legacies, 180–1–2.
Hill on Trustees, 132.
Morice vs. Bishop of Durham, 9 Ves., 399.
Norris vs. Thompson, 4, C. E. Green, 307—12.
S. C. on App., 5 C. E. Gr., 489—522.
Adye vs. Smith, 44 Conn't., 60. (26 Am. R., 424.)

VI.

Is not thirteenth item void for perpetuity?

The contingent interest may never vest.

The conditions precedent are void, hence the estate is void.

2 Blackstone's Com., 157.
2 Jarm. on Wills, (ed. 1880) 524.
Ib. 528–9—530–1, *n.* 20—21, 538–9, *n.* 23.

Legatee incorporated Dec 15th 1810 (Clayton's Dig. 618.) made capable in law of purchasing & conveying any Estate real & personal for the use of said Corporation"

VII.

As to the fourteenth item:

Can the Georgia Historical Society accept the trust attempted to be conferred upon it?

Its charter, granted "for the purpose of collecting, preserving and diffusing information relating to the history of the State of Georgia in particular, and of American history generally," empowers the Society "to purchase, take, receive, hold and enjoy, to them and their successors, any goods and chattels, lands and tenements, and to sell, lease, or otherwise dispose of the same, or of any part thereof, at their will and pleasure; *Provided*, that the clear annual income of such real and personal estate shall not exceed the sum of five thousand dollars, and provided, also, that the funds of the said corporation shall be used and appropriated to the purposes stated in the preamble of this Act, and those only."

Act of Dec. 19, 1839, §1.

The purposes stated in the preamble are quoted *supra.*

In 1870 the Legislature passed an Act by which it is enacted "that the provisos in the first section of the Act entitled an Act to incorporate the Georgia Historical Society, assented to on the 19th day of December, in the year 1839, be, and the same are hereby, repealed."

Act of Oct. 25, 1870.

The question is, had the Legislature the constitutional power to pass this last Act; and if it had, did it enable the Society to take the devise contained in the fourteenth item of the will as trustee?

By Constitution of 1868 (of force when the Act of 1870 was passed) it is provided that "The General Assembly shall have no power to grant corporate powers and privileges to private companies, except to banking, insurance, railroad, canal, navigation, mining, express, lumber, manufacturing and telegraph companies, * * * (other things prohibited) but it shall prescribe by law the manner in which such powers shall be exercised by the Courts." Code, §5068.

Constitution 1861, Art. II, §6, and Constitution 1865, Art. II, §6, contain same provision.

Again, the Constitution of 1868 provides:

§5146. IV. *Local and Private Acts.* Local and private Acts, passed for the benefit of counties, cities, towns, corporations and private persons, not inconsistent with the supreme law, nor with this Constitution, and which have not expired, nor been repealed, shall have the force of statute law, subject to judicial decision as to their validity when passed, and to any limitations imposed by their own terms.

The Constitution of 1877 contains the same provision as the first above cited.

Constitution of 1877, Art. III, §VII, Par. XVIII.

The Georgia Historical Society is not a charitable association.

The charter reads:

"That J. M. Berrien (and others—naming them), and such other persons as now are, and may, from time to time, become members of said Society, be, and they are hereby declared and constituted, a body corporate and politic, by the name of the "Georgia Historical Society," and by that name shall have perpetual succession, and be capable to sue and to be sued, to plead and be impleaded, answer and be answered unto, defend and be defended in all courts or places whatsoever, and to have a common seal, and the same at pleasure to change or alter, to make, establish and ordain such a Constitution and such By-Laws, not repugnant to the Constitution of this State or of the United States, as shall, from time to time, be necessary and expedient, and annex to the breach thereof such penalty, by fine, suspension or expulsion, as they may deem fit.

Article III, from the Constitution of said Society, reads as follows:

"The Society shall consist of Resident, Life and Honorary members: Resident members embracing those within the State; Honorary members those distinguished for their public services or literary attainments, particularly in the department of history, throughout the world."

Article VII, as follows:

"The admission of members shall be by ballot, and a majority of two-thirds of those present shall be required to elect. Applications shall be in writing, signed by the applicant and countersigned by the members presenting them. Such applications shall be posted in some conspicuous

position in the Library of the Society for at least one week before the regular meeting at which the applicant is to be balloted for.

Resident members shall pay ten dollars for the first year, and five dollars for each succeeding year."

Article IX, as follows:

"Any member who shall pay into the treasury of the Society the sum of one hundred dollars, thereby becomes a Life member, with all the rights, privileges and disabilities of a resident member, but shall be exempt from any farther payment."

No. 12, of the By-Laws of the Society, reads thus:

"Any failure on the part of the members, after due notice from the President, to pay their annual dues for two consecutive years, shall be considered a forfeiture of membership. And no person thus expunged can be eligible to re-admission without the strict payment of his arrears."

1. Jarman on Wills, (ed. 1880) 397—401, citing Cocks vs. Manners, L. R., 12, Eq., 574 (gift to convent.) Thompson vs. Shakespear, Johns., 612. 1 D. F. & J., 399 (private museum.) Carne vs. Long, 29 L. J., ch. 503. 2 D. F. & J., 75, (subscription Library.)

It cannot, therefore, accept the trust.

Jackson vs. Hartwell, 8 Johns 422.

Am. Col. Society vs Gartrell, 23 Ga., 448. Matter of Howe, 1 Paige, 214. Trustees, &c., of Meth. Seminary vs. Peaslee, 15 N. H., 317.

If the Society cannot take, then the trust fails; there being no trustee capable of taking, and goes to the heirs under Code, §2316, par. 4, already cited.

Certainly the realty so goes, ($30,000 worth of this bequest is realty in Savannah), and it is submitted that, for the purposes of descent, the shares in the A. & S. R. R. are to be regarded as realty.

The lease of the Road to the C. R. R. disposes of the entire franchise, and is perpetual. It is, therefore, an assignment. 2 Bl. Com., 317.

"Rent" only is reserved; and rent issues out of realty only.

2 Bouv. Dic. "Rent."

Shares in a Navigation Co. are realty, and subject to dower. Buckeridge vs. Ingram, 2 Ves. Jr., 652.

Land held by a partnership is treated, in Equity, as personalty. But a sale of his interest, by one of the firm, is within the statute of frauds.

15 Ga., 445.

Lapsed devises go to the heir.

Williams vs. Whittle, 50 Ga., 523.

And in this case lapsed legacies, Tulker vs. Tulker, 5 N. Y., 419–20. 2 Jarman, 570.

If Mr. Binney's definition of charity be correct, then the bequest contained in the fourteenth item is not a charity. He says: "To constitute a gift for a charitable purpose, it must be free from every taint of personal, selfish or ambitious motives."

VIII.

The First Presbyterian Church of Augusta, was incorporated under the name of the "Trustees of Christ's Church, in 1808, with power "to have,

hold and enjoy real and personal property, for the sole use and benefit of the said church."

Clayton's Digest, 464–5.

Name changed as above indicated in 1836.

Acts of 1836, p. 78–9.

IX.

The twenty-first item militates against the law of perpetuities.

When are the executors, or "their successors," to build the Telfair Hospital?

Sinnatt vs. Herbert, L. R., 7 Ch. App. 232.

When is the Act of incorporation to be obtained?

The gift here is not to an incorporated Society already in existence, but to individuals thereafter to be associated together, and incorporated at some indefinite future time.

Zeisweiss vs. James, 63 Penn. St., 465. (3 Am. R., 558.)

The rule requires that in such a case the incorporation must necessarily take place within the legal limit.

Holmes vs. Mead, 52 N. Y., 332.

Fontaine vs. Ravenel, 17 How.

Leonard vs. Bell, 1 S. C. N. Y., 608. Affirmed 58 N. Y., 676.

The executors are only trustees to build and turn over. This does not make them trustees of the charity.

Zeisweiss vs. James, 3 Am. R., 562–3.

23 N. Y., 303—382–3.

The gift of the entire income to the future corporation carries the *corpus.*

Code, §2455, reads thus:

§2455. (2419.) *Gifts of income.* An unconditional gift of the entire income of property, or interest accruing from a fund, will be construed into a gift of the property or fund, unless the provisions of the will require a more limited meaning.

Is this item sufficiently certain, definite and specific? What females are meant? Whence must they come?

Grimes's Ex'rs. vs. Harman, 9 Am. R., 690, *et seq.*

Kain vs. Gibboney, 101, U. S. R., 362.

X.

Certainly the twenty-third item is a postponement of the legacy, possibly, for all time to come, and the legatees as uncertain as the time is indefinite.

The other questions have been sufficiently discussed.

In conclusion, it is to be noted that the devises, &c., to the charitable associations are of three classes:

1st. To them for their own uses. 2d. To them in trust for charitable objects, without the purview of their charters. 3rd. Devises, &c., in part for themselves, and in part for other trusts than those indicated in their charters.

The devises, &c., in the 11th, 12th, 13th, 17th, 21st and 23rd items are of the first class.

The devise, &c., in the 14th item is of the second class.

That in the 10th item of the third class.

When the objects are without the purview of the charters, the beneficiaries are to be selected by the corporation, *in their discretion*, as in tenth item, or the expenditures to be made (as in fourteenth item) in the like discretion.

If the Societies named are incapable of exercising that discretion, can a Court of Chancery appoint some one else to exercise *his* discretion?

Fontaine vs. Ravenel, 17 How., 369.

